No. 89-612

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE de la COVA and DOROTHY JESSUP, individually and on behalf of all other persons similarly situated,
Petitioners,

-against-

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELEANOR JACKSON PIEL
Attorney for Petitioners
36 West 44th Street
New York, New York 10036
(212) 575 0797

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QUESTIONS PRESENTED

1. Did the Second Circuit appropriately consider the shift of the burden of persuasion to a university employer in a Title VII class action brought by female faculty members on behalf of themselves and the class they represent, where anecdotal and statistical evidence established that gender was a substantial factor in decisions concerning faculty rank, tenure and compensation under principles set by this Court?

2. Did the Second Circuit's affirmance of the trial court's ruling in a Title VII gender discrimination case -- that regression analyses showing negative residuals of more than two or three standard deviations did not establish a sufficient showing for a prima facie case -- violate settled case law of this Court and conflict with rulings of other Circuit Courts of Appeal?

3. Does this Court's rule that salary inequities between faculty men and women be adjusted as soon as the Civil Rights Act was applicable to universities require reversal of the Second Circuit's affirmance of the trial court's ruling that even though the inequities were not remedied, the good intentions of the university barred its liability to female faculty?

4. Did the statistical proof that rank was a tainted variable shift the burden of proof to the defendant university- employer to prove rank was not a tainted variable and accordingly, that gender was not a substantial factor in the award of rank and promotion to female faculty members?

a. In this connection, was it error for the Second Circuit to affirm the trial court's exclusion of an exhibit which demonstrated as to rank that similarly qualified women were hired into lower ranks than men?

5. Where the Second Circuit affirmed the district court in ruling that defendant university-employer had no intent to discriminate, and where the criteria for promotion, tenure and salary increases are subjective, are plaintiffs in a class action Title VII disparate treatment case where statistically significant evidence shows discrimination against women faculty, entitled to the presumption of a disparate impact case under the established law of this Court?

LIST OF PARTIES

Petitioners are Roberta Ottaviani, Carolee Schneemann, Joan Marie de la Cova, Dorothy Jessup, individually and on behalf of other members of the faculty at the State University of New Paltz who are similarly situated.

Respondents are the State University at New Paltz and Clifton R. Wharton, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Roberta Ottaviani, Carolee Schneemann, Joan Marie de la Cova, Dorothy Jessup individually and on behalf of all other persons similarly situated, pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Order of the District Court is reported at 875 F. 2d 365. It is reproduced in Appendix A to this Petition at A-1. The opinion of the District Court is reported at 679 F. Supp. 288. It is reproduced in Appendix B to this Petition at A-28.

STATEMENT OF JURISDICTION

The judgment of the the Court of Appeals (Appendix C at A-121) was entered on May 9, 1989. A timely petition for rehearing with a suggestion of rehearing *en banc* was filed; it was denied on June 15, 1989. Justice Marshall granted an extension of time to file this petition to October 12, 1989 (Appendix D at A-123). The jurisdiction of this Court is conferred by 28 U.S. C. §1254 (1).

STATUTES INVOLVED

This case was brought under Title VII the Civil Rights Act of 1964 as Amended 42 U.S.C. §2000e *et seq*. The relevant portion of the statute appears in Appendix E at A-124.

STATEMENT OF THE CASE

Preliminary Statement

The case was brought by four faculty plaintiffs, three of whom were or are full-time academic rank female faculty members at the State University of New York at New Paltz in

the Division of Liberal Arts and Sciences, on behalf of themselves and a class of women similarly situated. They claimed they were discriminated against on account of gender in placement in initial rank, in promotion into higher rank and in salary during the academic years commencing in 1973 and ending in 1985.[1]

Plaintiffs' evidence at the nine-month trial in the District Court consisted of twenty-one witnesses, in addition to the four plaintiffs, who gave anecdotal testimony that discrimination against women faculty on account of their gender was pervasive on the New Paltz university campus. Plaintiffs also produced expert testimony based on the statistical procedure of multiple regression analysis. These statistics conclusively corroborated the anecdotal evidence showing that discrimination on account of gender in rank as well as in promotions and salaries existed and continued at the New Paltz campus over the entire period of the case (1973-1985). The statistical evidence further showed (as to evidence admitted and evidence improperly excluded) the persistence through the class liability period of discrimination as to gender in the salary and rank of women faculty members hired before the commencement of the period and the effective date on which Title VII became applicable to universities (March 24, 1972).

At the end of the case, District Judge Shirley Wohl Kram

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[1]There were approximately 30 women in the class during each year of the period and over the entire time approximately 100 different women in the class.

found for the defendant university on all claims.[2] Significantly, the District Court did not dismiss the case at the end of the plaintiff's case, but held that the negative residuals of "two to three standard deviations" favoring a conclusion of gender discrimination as to the class represented by plaintiffs' statistical evidence were "not sufficiently high to support a prima facie claim of salary discrimination," although, the court said, they did not "preclude an ultimate finding that the plaintiffs [would make] a prima facie showing." (A-53)

The Anecdotal Evidence and Court Rulings

Discrimination as to the Class

Throughout the class period of 1973 through 1985, the administration of the university failed to take the steps necessary to identify the nature and extent of the conceded discrimination against women during the pre-Act period (prior to 1972) even though it was recognized in the community that the salary of women faculty members had to be raised. The Committee on the Status of Women in 1974 reported to Dr. Stanley Coffman, President of SUNY New Paltz from 1972 through 1979, that in a survey of the entire college, 32 women had claimed salary inequities of $1000 or more and that these inequities had to be remedied for the university to comply with the law (T. 690, 691, Pl. Exh. 126).

President Coffman thought the report fair and that its conclusions should be implemented, but they never were

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[2]Judge Kram awarded a money judgment ($5,542) to one intervening faculty plaintiff based on a finding that the defendant university had violated the Equal Pay Act (29 U.S.C.§216 (b). That case is not involved here. The court also found evidence of gender discrimination against two other women faculty members who testified for the class, but found that such discrimination as they suffered did not support a class action claim of discrimination as to gender of the other plaintiffs.

(T. 3311, 3388, 3458, 3459). He also conceded that there would have been enough money in the budget in 1974 to bring the women up to what the Committee on the Status of Women regarded as equitable (T.3463-3464, Pl.Exh. 120, T. 3739). None of the 32 women identified in the Report as requiring equity increases in salary received raises following the receipt of the committee's recommendation (T. 4920, Pl. Exh. 174).

Although there was supposedly a program of affirmative action set up in the university, it operated in name only. There was no system set up to identify or address inequities in the salaries of male and female faculty members except for two years in 1977 when the Administration used the salary kit and "flagging" system advocated by the American Association of University Professors (AAUP) which, again, it did not implement (T.2415, 2457, 2464, T.4401, 4922, Pl. Exh. 155). Moreover, the administration prohibited publication of the results of the flagging system for fear of "inviting trouble" (T.1915,4614) .

The trial court ignored this evidence and found,

> "In sum, New Paltz' distribution of discretionary money was a flawed but good faith attempt to remedy pay inequities. It is thus evidence that New Paltz did not intend to discriminate against women." (A-65)

The court below in affirming this ruling failed to consider the scanting of the statistical evidence by the trial court that made it possible for the trial court to embrace the defendants' avowal of good intentions and defendants' specious and self-contradictory explaining-away of plaintiffs' anecdotal evidence:

> "In this case, the district court found that the defendants had succesfully rebutted the plaintiffs' anecdotal proof, and that, in any event, the anecdotal evidence on its face was too limited to prove class-wide discrimination. (A-25)

The court below thus affirmed the trial court's ruling that the defendants' failure to remedy pay inequities was evidence of good intentions that relieved the university of any liability for its failure to remedy the inequities.

Individual Instances of Gender Discrimination

Eleven witnesses for plaintiffs testified to individual instances of sex discrimination in salary and rank at SUNY New Paltz as reflecting defendants' practices in this respect. Their testimony showed that women faculty members with similar qualifications or with more publications, awards, years of teaching experience and service to the college than the men in their departments, received substantially lower salaries than their male colleagues.

One female professor on a tenure track, an awardee of a Chancellor's award for excellence, and under consideration for promotion, discovered that, in place of the five published criteria (*i.e.*, excellence in teaching, scholarship, mastery of subject matter, professional growth and university service), the university was considering her on the basis of the university's "pragmatic needs" and her "personality" and further that there were separate tenure tracks for men and women (T. 300, 311).

Dr. Nancy Schniedewind, another woman professor testified that she had served as coordinator of Women's Studies from 1978 to 1983 (T. 2936). In 1983, the university established the faculty of Women's Studies, an action for which Dr. Schniedewind had argued. Significantly, in terms of the contentions made by plaintiffs concerning discrimination, another person, not Dr. Schneidewind, was made the coordinator of the new faculty. Dr. Marleigh Grayer Ryan, the new coordinator, was in no way commited to the program envisaged by Dr. Schniedewind and other women (T. 3950). An

outside-the-university evaluating committee set up to look into the controversy which now developed found with respect to Dean Ryan,

> "The great majority of Program people with whom we spoke believe that Dean Ryan would be glad to see the Program dismantled or transformed into something that from their point of view would be a Women's studies program in name only. The Dean is widely thought to see the present Women's Studies Program as lacking in academic credibility -- perhaps because of its commitment to a feminist perspective as a fundamental component of educational reform" (T. 2976, Pl.Exh. 972).

On this issue, the court below, affirmed the trial court in its disregard of the significance of this demonstration of prejudice against women's issues (A-77).

The Individual Plaintiffs

Similar evidence as to inequity in the university decisions concerning the four individual plaintiffs was adduced at the trial. Evidence that these women were active in advocating women's issues and equity for women faculty, was used against them when they were considered for promotion in rank or tenure. Plaintiff Jessup, was denied tenure, for example, because "departmental balance would allow for one such woman devoted to students, but not two" (T. 4490-4492).

Plaintiff Ottaviani, denied tenure in 1973, and dismissed from the faculty in 1974, although considered "cute," was widely regarded by the university administration as an irritant and too committed to the women's cause. Although she received high recommendations for tenure and promotion from her department chairman and a faculty committee, the president of the university turned her down because, he said, that she did not have enough credits toward her doctor's degree. When it was established by a letter from the chairman of her

department that a doctor's degree was not a requirement for her position or advancement, the president said he paid no attention to this opinion (T. 3740-3741). This was the same president who turned down Plaintiff Jessup for tenure on the gender prejudiced grounds set forth above.

In these and other instances of clear and unrebutted evidence of articulated prejudice against women, the court below did not weigh the special character of that evidence in the light of the subjective standards invoked. Thus, although the trial court spoke of a shift in the burden of proof, it did not apply the test articulated in *Price Waterhouse v. Hopkins,* _U.S._, 104 L.Ed. 268 (1989) calling for a shift in the burden of persuasion where gender appears to be a substantial factor in the employer's decision. The court simply found that the decisions concerning these women were "neutral" and not "pretextual" (A- 74,84), or for example that the decision against the woman involved her poor "relationships," (A-79).

The instances of discrimination in this action cited and others equally disgraceful in the trial record *supra* call in, however, from *Price Waterhouse* another test: would the employer have made a different decision if the employees' gender had been different? Where plaintiffs' status are compromised by such terms as "cute," by "pragmatic needs" and "departmental balance" that allow for only "one such woman," by references to "personality," poor "relationships," and other subjective criteria inevitably colored by gender, the presumption must be that the test is flunked, especially where, as in the trial-court opinion such considerations are invoked to offset objective criteria as academic degree, publication record, and teaching experience.

Statistical Evidence and Court Rulings

Plaintiffs' expert, Mary Gray, a professor of mathematics, statistics and computer science at American University in Washington, D.C., subjected data furnished by defendants to the accepted technique of multiple regression analysis. From computer runs employing this procedure, Dr. Gray produced evidence that met and more than met the accepted minimum test of statistical significance (the .05 level of significance), also referred to as 2 standard deviations from the norm, or less than one chance in 20 that such result is owing to chance and not, in this case, to discrimination on account of gender. Dr. Gray analyzed data relating to all members of the defendant-university faculty throughout the class period (academic years 1973-1974 through 1984-1985) (Pl.Exhs. 882, 949), including data relating to persons hired before the date the Civil Rights Act became applicable to universities (March 24, 1972). In her so-called "main" study, (Pl. Exhs. 882, 949) Dr. Gray excluded rank as an independent variable in order to isolate the effect of the independent variable, gender, upon the difference in compensation accorded to female and male faculty members. She did so because, as she testified, the same entity -- the administration of the defendant-university -- made decisions concerning rank as well as salary and promotions, and on much the same grounds; she documented this assertion in another study (Pl. Exh 1021), as will be shown *infra.*

In Exhibits 882 and 949, she chose nine independent variables, in addition to gender, which reflected the experience and background of the faculty members. The study yielded negative residuals, evidence of discrimination against the plaintiff class, with residuals of more than three standard deviations: deviations exceeding one chance in 384 all the way

to one chance in more than 15,768 that the result -- the dependent variable: salaries paid to women -- were owing to chance in all but one year of the study. For the one exception-year, the last year, the analysis yielded a standard deviation of 2.7 -- or close to only one chance in 384 that the result in that year was owing to chance. See Appendix F, A-125, for correspondence of standard deviation to chance.

The statistical evidence in this study including the result for the last year, demonstrating discrimination against women in the award of compensation, was overwhelming. The trial court, however, set aside the results of this study because it omitted the "rank" variable. In doing so, the trial court betrayed its ignorance of the nature of statistical proof. This study was one of an ensemble: the omission of rank was "controlled" by its inclusion in a parallel study (Exh.1021); the two studies taken together provided measurements of the effect of gender on rank and salary taken separately. The parallel "control" study supported Dr. Gray's testimony that rank was a "tainted" variable -- tainted by the same discrimination that operated in award of compensation. With an effect described by Dr. Gray as "double- counting," the insertion of rank as a variable reduced the negative residuals as to compensation of women faculty. For the disparities in rank and compensation combined, the analysis showed the "net effect of being female" conclusively: by nearly three standard deviations (1973-74, 1977-78,1983-84) to nearly four standard deviations (1974-75, 1981-82,1984-85), to nearly five standard deviations (1978-79,1979-80,1980-81) to more than five standard deviations (1982-83) (Pl. Exh. 1021).

The court barred from evidence, pursuant to objection from defendant on the ground that it included persons hired before

Title VII applied to universities, a proferred exhibit supporting and explaining the results of the regression analyses: showing as to persons equally qualified, 67 percent of females hired as lecturers and 71 percent of males hired as assistant professors (Exh. 990, T. 5647). This exhibit, as did all of the plaintiffs' statistical exhibits, included persons hired before 1973 -- persons who constituted 94 percent of the faculty in that year and 69 percent of the faculty in 1985 (Def. Exh. S6, p. 20, T.692).[3] The names of plaintiffs de la Cova and Ottaviani appear among the females listed in barred Exhibit 990 among the females thus disadvantaged. With respect to the barred exhibit, Dr. Gray calculated the working of discrimination against females at this entry level at 2.95 standard deviations. The Second Circuit stated erroneously, however, that the exhibit (Exh. 990) was barred because it was "unreliable and incomplete" (A-26).

The Second Circuit affirmed this erroneous ruling, demonstrating that it shared the trial court's ignorance or misunderstanding of the ruling of this Court in *Bazemore v Friday,* 478 U.S.385 (1986), that all inequities in pay and otherwise must be equalized as soon as the Civil Rights Act of 1964 became applicable to the employer.

The court below affirmed the trial court's exclusion of an exhibit (Exh. 891A) which established statistically that for no reason other than gender, men consistently held higher ranks than women throughout the class period. The court below

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[3]It is significant that *all* of the plaintiffs' regressions included factual data about faculty dating before 1973. Neither the court nor the defendants' counsel, however, understood the significance of this and as a result other exhibits subject to the same objection as Exhibit 990 were admitted in evidence without objection. None of the defendant's regressions included such information, a fact noted by the trial court (A-53).

affirmed this ruling without either understanding or discussing its effect on the rank issue.

The trial court put the onus of proof as to rank on the plaintiffs and concluded that the plaintiffs had failed to prove that rank at New Paltz was discriminatory (A-45). The court below affirmed the trial court in its ruling that plaintiffs had failed to prove that rank was a "tainted" variable, and went beyond the trial court to state without any evidence in the record, that the defendants had offered "persuasive objective evidence to demonstrate that there was no discrimination in either placement into initial rank or promotion at New Paltz between 1973 and 1984" (A-23).

Accepted, however, as "persuasive" by the trial court were three studies made by plaintiff's expert which included rank as a variable. These regressions and the standard deviations in the negative residuals for females are set forth in Appendix G, A-126. Exhibit 888 includes department chair as a variable, Exhibit 889 excludes department chair, and Exhibit 890 includes department chair and the extra pay stipend that goes along with the department chair. Each of the regressions show a negative residual for females in each of the years. Exhibit 888 shows that negative residuals above two standard deviations in eight out of the eleven years, ranging from 2.14 (for 1980-81) to 4.12 (1977-78), and above 4 standard deviations in three years. Exhibit 889 had negative residuals for females ranging from two standard deviations to 5.08 (1982-83) in ten out of the eleven years, with five of those years showing standard deviations of more than three. Exhibit 890 shows negative residuals for females in eight of the eleven years, ranging from 1.97 (1980-81) to 4.07 (1976-77) standard deviations.

As to these three studies, the trial court, after finding them "persuasive," stated:

> "The residuals are ...generally associated with standard deviations between one and five. Two residuals fall below one standard deviation, one residual is greater than five standard deviations and none are higher than six. *These deviations... are not sufficiently high to support a prima facie claim of salary discrimination.*" (A-52,53) (emphasis supplied).

The court reaffirmed its lack of understanding of statistical evidence in another part of its opinion (all of which was affirmed by the court below) stating:

> "When reviewing statistics which show relatively small disparities, *such as one to three standard deviations,* a court should be cautious about drawing the inference of discrimination." (A-51)

Such statements betray not only lack of understanding of the statistics but also of the probatory standards for such evidence accepted by this Court. By those standards, plaintiffs' evidence established such a compelling prima facie case that the trial court should have looked at all the other evidence in a different light.

The court below avoided ruling on the trial court's assertion that the probabilities shown above did not establish a prima facie case for plaintiffs. Instead, the court below held that the trial court had ruled, after all the evidence was in, that it was not persuaded. The court below said (without support in the record or in the district court opinion):

> "On rebuttal ...the defendants were able to successfully undermine the plaintiffs' case by attacking the validity of the plaintiffs' statistical evidence, and by introducing statistical evidence of their own to negate the inference of discrimination that had been raised."(A-20)

In fact, the trial court found no such weight or persuasion in defendant's statistical evidence and it had small reason to find

otherwise. Reflecting defendants' misunderstanding of its obligations under Title VII as defined by *Bazemore*, its statistical tables excluded data about persons hired before the beginning of the class period, academic year 1973-1974 (A-53). In consequence, its studies dealt only with the 31 percent of the faculty hired during the class period.

The defendants' statistics in rebuttal were found by the trial court to contain a "questionable" variable -- year of hire which was "too volatile" to be reliable. Further the court found that the defendants' regressions underestimated the degree of salary differential between men and women and yet *"were not low enough to rebut a finding of class-wide discrimination"* (A-53). Moreover, the court further found that the defendant's failure to account for salary decisions made before 1973 and the residual effects of such decisions made the studies of limited usefulness (A-53). Nonetheless, the court found the studies "relevant"

> "in assessing the state of mind of the New Paltz administration from 1973 to 1984...They demonstrate that the Administration did not discriminate against women in initial salary, rate of increase or distribution of discretionary money." (A-53)

In betrayal of its own ignorance of the nature of statistical evidence and the standards of probatory value of such evidence set by this Court, the court below added up all of the regression runs in the three different studies reported in plaintiffs' exhibits 888,889, and 890 -- ignoring the fact that they tested and compared three different variables -- and stated:

> "...and of the total thirty-three standard deviations cited [this is eleven for each year in each regression], twenty-four exceeded two standard deviations. Significantly, however, nine of the measures cited fell below two standard deviations. Also the negative

residuals associated with being female were not significant in every year of the liability period." (A-16,17)

In addition to the error of lumping together separate regression analyses, all of which together showed -- at the probatory standards of this Court, as shown *supra* -- discrimination on account of gender against women during the class period, even with rank included as a variable, the court below went further to hold, if not in so many words, that statistical proof of discrimination must show a significant standard deviation for *every* year of the class period. Without contrary record evidence, and against the evidence received, the Second Circuit held that the defendants had successfully rebutted plaintiffs' statistical evidence (A-20). All the trial court had found on the basis of the inconclusive and flawed statistical evidence offered by the defendants was that defendant university did not *intend* to discriminate against women faculty.

The court below showed its own silent gender bias in its opinion when it concluded that independent variables derived from a "males only" regression might overestimate the predicted salaries of females. viz:

> "The defendants also criticized [plaintiffs'] studies because the salary regressions were 'fitted' only to male faculty members, i.e. they used independent variables that were derived only from the male population. The district court noted in its opinion that a 'males only regression' [offered by plaintiffs] based exclusively on values existing only in the male population might have tended to overestimate the predicted salaries of certain female faculty members, because it might not have taken into account legitimate factors existing solely in the female population which could have affected the rate of pay for women teachers at the University...If the

> predicted salary for a female faculty member was overestimated, this type of regression arguably would have overestimated the discrepancies between male and female salaries at the University." (A-21)

The proposition that some unspecified "legitimate factors existing solely in the female population" could account for inequity in compensation (and rank) reflects the kind of bias and stereotyping of women's role in society which this Court disapproved in *City of Los Angeles v. Manhart,* 435 U.S. 702, 707 (1978).

Finally, the court below held that:

> "Apart from these criticisms of plaintiffs' statistical evidence, the defendants also offered persuasive anecdotal evidence to negate plaintiff's claims of discriminatory animus."

On this level, although the trial court ultimately found for the defendants, its comments in reaching that conclusion belied the final result. See the following pages of the trial court's opinion (A-66-68, 74,76-78,79,87,98-104,105). From those pages, it is plain that the court did not reckon with the considerations mandated in *Price Waterhouse v. Hopkins,* ___U.S.___, 104 L.Ed. 268 (1989) -- that if sexual stereotyping plays a role in the decision process which results in an unfavorable decision about the advancement of a Title VII claimant, the burden of persuasion shifts to the defendant to prove to the court that no unlawful motive was a substantial factor in the decision and further that the employer would have reached the same decision even if the minority person had been otherwise. Thus the finding by the court below that "after considering all of the evidence presented, both statistical and anecdotal, the district court simply found that plaintiffs had failed to preponderate on their claims," (A-21) must be reconsidered by this Court for the reasons set forth below.

REASONS FOR GRANTING THE PETITION

This case raises fundamental questions as to the judicial implementation of disparate treatment and disparate impact theory; as to the standards of statistical proof combined with anecdotal evidence, and as to the allocation of the burden of proof under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* This Court has recently dealt with three cases involving some of the issues here in *Bazemore v. Friday, supra, Watson v. Fort Worth Bank and Trust Company, 487 U.S.___* 101 L.Ed. 2d 827 (1988) and in *Price Waterhouse v. Hopkins, supra.* All of these decisions were before the Second Circuit Court of Appeals when it decided this case, yet all three and their holdings were scanted and ignored by the court below. Because *Bazemore* was decided three years ago, the decision of the Second Circuit, in ignoring its holding both as to the significance of statistical evidence and the requirement that all pre-Act discrimination be remedied when the Civil Rights Act became applicable to the employer, necessarily involves conflict with other Circuit Courts of Appeal which have followed this Court's rulings.

This case is also the first case to reach this Court concerning discrimination against faculty as to gender in a state university, considered by some as the last bastion of male dominance. In this connection this Court is asked to consider -- where the insertion of rank as an independent variable in a regression analysis is shown to reduce the negative residual attributable to gender and so betrays discrimination in rank as well as gender -- whether the burden does not shift to the defendant to persuade the court that rank is not a tainted variable.

This petition should be granted because only this Court can

answer the questions raised, resolve the conflicts created and rectify the wrong to the petitioners individually and the class of female university faculty they represent.

I

THE DECISION OF THE COURT BELOW UPHOLDING THE TRIAL COURT'S RULING FOR DEFENDANT EMPLOYER UNIVERSITY IN A CLASS ACTION TITLE VII CASE BROUGHT BY FOUR INDIVIDUAL FEMALE FACULTY MEMBERS FOR THEMSELVES AND THE CLASS SHOWING THAT GENDER PLAYED A SUBSTANTIAL ROLE IN EMPLOYMENT DECISIONS VIOLATES THE RULING IN PRICE *WATERHOUSE v. HOPKINS* WHICH SHIFTS THE BURDEN OF PERSUASION TO THE EMPLOYER TO SHOW NO ILLEGITIMATE CRITERIA

This case was tried before this Court decided *Price Waterhouse v.Hopkins,* (May 1, 1989), but this Court's opinion was known to the court below when it decided this case.

As set forth in the Statement of the Case, the anecdotal evidence offered by both the plaintiffs and the defendant university administration established that, prior to the commencement of the class action, there was pervasive discrimination in salary, rank, tenure and promotion against women faculty at the SUNY New Paltz campus and that no process was ever set up to effectively remedy this inequity, nor did the partial remedies instituted achieve equity. This evidence was offered to support the class action of plaintiffs, but it is relevant evidence supporting the individual cases of discrimination as well.cf. *Dillon v. Coles* 746 F.2d 998, 1004 (Cir.3 1984).

Now, the issue this evidence poses under the *Price Waterhouse* case is whether in a class action joined with four

individual actions, the burden of persuasion shifts to the employer to show that there was a legitimate reason for discrimination against the class where both statistical and anecdotal evidence bear out the contention that women were treated less favorably than men in compensation and rewards at New Paltz.

The court below did not reach that issue except to say, quoting this Court "the situation before us is not the one of 'shifting burdens' that we addressed in *Burdine [Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981)]" (A-12,13,n.5).

At no time in its lengthy opinion (A-28-120) did the trial court put the test mandated by this Court in *Price Waterhouse* to the evidence adduced; *i.e.* would the decision have been the same with regard to the denials of tenure, promotion and increase in salary of the various plaintiffs and members of the class, if the applicant had been a male. Instead, the trial court in each instance of charged discrimination, asked whether that decision had been made in good faith -- after deciding the decision was a good faith decision, the court would decide that it was based on "neutral" (A-96,104,106) reasoning and that it was not "pretextual" (A-74,82,88,97,102,106). It would conclude discussions with the statement that difference (in salary, tenure etc.) "can be explained" (A-73,79). Clearly this did not respond to the *Price Waterhouse* test -- would the decision be the same if the person were a male faculty member? In fact the opposite occurred in some instances: the trial court cited gender-laden considerations against objective academic qualifications to "explain" the neutrality of defendants' treatment of its female faculty members ([faculty and class member]: A-64,73,74-79,80-87 [individual plaintiffs]: 87-107).

Thus the case should be returned to the district court to reconsider the evidence adduced as to discrimination against the class and the four individual plaintiffs in the light of *Price Waterhouse.*

II

THE SECOND CIRCUIT AFFIRMING THE TRIAL COURT, FAILED TO FOLLOW THE HOLDINGS OF THIS COURT ON THE ISSUE OF THE SIGNIFICANCE OF STATISTICAL EVIDENCE IN TITLE VII LITIGATION AS WELL AS THE REQUIREMENTS OF A PRIMA FACIE CASE; THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL ON THIS ISSUE

Although the court below gave lip-service to the rulings of other courts and this Court on the issue of statistical evidence and its significance, it failed to see in its affirmance of the trial court that the district court showed no understanding whatsoever of the probatory value of evidence from the statistical procedure of multiple regression analysis. Thus the trial court excluded from evidence, or excluded from its consideration, statistical exhibits proferred by plaintiffs as an ensemble and establishing cumulatively overwhelming evidence in support of plaintiffs' case. The court gave as its ground for doing so reasons that betrayed its ignorance of the nature of such evidence and of the probatory value accorded to it by this Court and by Circuit Courts of Appeal. From plaintiffs' ensemble of studies, the trial court picked three regression analyses of sets of variables which the court approved as valid in all respects; the court found, however, that the negative residuals for females from these regressions which ranged from two standard deviations to five standard deviations, were

..."not sufficiently high to support a prima facie claim of salary discrimination." (A-53)

Elsewhere, the trial court stated that "one to three standard deviations" are "relatively small disparities" and could not support a finding of a prima facie case (A-51).

In *Castenada v. Partida,* 430 U.S. 483, 497, n. 17, (1977) again affirmed in *Hazelwood School District v. United States,* 433 U.S. 299,309n. 14 (1977) this Court expressed the general rule,

> "if the difference between the expected value and the observed number is greater than two or three standard deviations, the the hypothesis that [the disparity] was random would be suspect to a social scientist."

This formula has been generally accepted by the Circuit Courts of Appeal dealing with this issue. See *Palmer v. Shultz,* 815 F. 2d 84, 96 (CADC 1987), *Trout v. Lehman,* 702 F.1094,1102 (CADC 1983), vacated on other grds. 465 U.S. 1056; *Segar v. Smith,* 738 F. 2d 1249,1283 (CADC 1983) cert. den. sub nom *Meese v. Segar,* 471 U.S. 1115 (1985); *EEOC v. American National Bank,* 652 F. 2d 1177,1192 (4th Cir.1981), cert. den. 459 U.S. 923; *Craik v. Minnesota,* 731 F. 2d 465, 475 n.13 (8th Cir. 1984).

The trial court, having accepted the plaintiffs' three regression analyses showing substantial disparities in salaries between men and women during the class period, nonetheless found that these figures showing disparities higher than three standard deviations in the majority of the years, did not prove a prima facie case (See Appendix F and G, A-125,126). Accordingly, that court did not weigh the evidence according to the dictates of *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) concerning burden of proof after the

plaintiff has made out a prima facie case.

The court below avoided any dilemma this might have presented and ruled that since the case was "tried on the merits," the issue of a prima facie case was "no longer relevant" (A-19). The court below then held with no basis in the trial court's findings that the trial court had correctly found that

> "on rebuttal...the defendants were able to successfully undermine the plaintiffs' case by attacking the validity of the plaintiffs' statistical evidence and by introducing statistical evidence of their own to negate the inference of discrimination that had been raised. "(A-20)

Nothing in the record, including the findings of the trial court supports the appellate court's conclusion.

When the court below specifically discussed the three salary studies the trial court had found "persuasive," it placed a new twist on the law in multiple regression analysis which involves a class period as in this case of eleven years.

> "...the three salary studies ...produced a range of standard deviations between approximately one and five and of the total thirty-three standard deviation measures cited, twenty-four exceeded two standard deviations. Significantly, however, nine of the measures cited fell below two standard deviations. *Also the negative residuals associated with being female were not significant in every year of the liablity period."* (A-17) (emphasis supplied)

In reading this excerpt of the court's opinion, it is completely unclear that the court is referring to three different exhibits and regression studies (Exhs. 888,889,890). Considered seriatim, they showed significant discrimination against female faculty in 8,10 and 8, respectively of the eleven years. The court below has set up a new and novel standard for discrimination in class action cases. The standard requires that, unless all the years

over a class period show a statistically significant disparity, the plaintiff has failed to prove her case. This is at variance with *Bazemore,* 478 U.S. at 399 where this Court in considering regression analyses for the years 1974 through 1981 found at least one year to have no statistical significance.

If indeed this Court is to require that a prima facie showing of discrimination under Title VII requires that a series of regression analyses over a period of eleven years show significant figures for *every* year of the period, this is an appropriate case to make such a holding.

III

THE SECOND CIRCUIT DISREGARDED THE *BAZEMORE* HOLDING THAT TITLE VII REQUIRES ALL INEQUITIES UNDER THE ACT TO BE REMEDIED AS SOON AS THE ACT APPLIES TO THAT EMPLOYER AND THAT GOOD INTENTIONS ARE NO DEFENSE TO LIABILITY AS TO A CLASS OR INDIVIDUAL LITIGANTS

The trial court, affirmed by the court below, disregarded the imperative ruling of *Bazemore* concerning an employer's obligation under Title VII of the Civil Rights Act to remedy immediately any inequities suffered by minorities covered by the Civil Right Act. The trial court, affirmed by the court below, did not discuss this obligation and disregarded the significance of the statistical and anecdotal evidence bearing out the conclusion that the inequities noted in 1974 were never adjusted for faculty hired before the class period. See II above.

Instead, the courts below found that the defendants did not *intend* to discriminate against female faculty with respect to their complaints and accordingly were not liable. Although "[p]roof of discriminatory motive is critical,...it can in some situations be inferred from the mere fact of differences in

treatment." See *International Brotherhood of Teamsters v. United States,* 431 U.S. 324. 334 n.15 (1977).

Plaintiffs contended below that the overwhelming statistical and anecdotal proof of such discrimination was circumstantial proof of motive since it was clear and recognized by the university administration that the discrimination as to gender existed in the faculty before the Civil Rights Act was applicable to New Paltz and it was conceded that the inequities were never completely remedied.

The trial court in reviewing the evidence and the circuit court reviewing the decision did not appear to be aware of the *Bazemore* rule that required that salaries of women faculty (and any rank status as well) which were below those of their male colleagues be equalized immediately when the Civil Rights Act became applicable to universities (March 24, 1972).

On the contrary, the trial court, affirmed by the court below, excluded, ignored or scanted plaintiffs' evidence covering the entire faculty throughout the class period and ruled for defendants even though *all* the statistical evidence of the defendants excluded any facts concerning the prior ranks or salaries of faculty hired prior to the class period. Further, although the trial court accepted three of plaintiffs' exhibits as representing a fair description of factors going into the salary equation which showed prejudice and discrimination against women at levels of significance considered by this Court to be prima facie proof of the fact of discrimination, the trial court held otherwise.

Finally, again not understanding *Bazemore,* the trial court excluded from evidence exhibits showing that women were not hired into the appropriate ranks -- or at least not ranks equal to men faculty -- because, the court said, information was

included about persons prior to the class period.

The opinion of the Second Circuit, read in conjunction with the trial court's ruling, establishes new law in the discrimination field. If this Court permits the decision to stand, it will in effect, accept diametric contradiction of its own holdings and those of other Circuit Courts of Appeal with respect to Title VII.

IV

WHERE STATISTICAL AND ANECDOTAL EVIDENCE SHOWED THAT DEFENDANT UNIVERSITY PRACTICED DISCRIMINATION AS TO GENDER IN ASSIGNMENT OF FACULTY TO RANK IN THIS TITLE VII CASE, THE COURT BELOW ERRED IN AFFIRMING THE TRIAL COURT'S FAILURE TO SHIFT THE BURDEN OF PROOF TO DEFENDANTS TO SHOW OTHERWISE; IT WAS FURTHER ERROR TO EXCLUDE RELEVANT EVIDENCE IN SUPPORT OF PLAINTIFF'S CONTENTION THAT THE INCLUSION OF RANK IN A REGRESSION ANALYSIS SKEWS THE RESULTING STATISTICS

This Court has never addressed the issue of rank and its use in a regression analysis in the determination of gender discrimination at a university. As to the use of rank as a variable does the plaintiff or the defendant have the burden of proof and if so was it sustained in the instant case?

At trial, experts on both sides agreed that to include rank in a regression analysis is to double-count a variable which would be favorable to the party opposing the charged discrimination. The defendant's expert had said this many years ago but changed her position on the matter at this trial because she was "no longer being a purist doing a study to be published in an economics journal"(T. 5241). The trial court

held here (affirmed by the Second Circuit) that plaintiffs did not prove that rank was a tainted variable and so it was appropriate that it be used in a regression analysis.

Plaintiffs' statistical Exhibit 1021 demonstrated that the according of rank was tainted by the same discrimination on account of gender that caused disparity and inequity in the payment of compensation to female faculty members. As set forth in the Statement of the Case, *supra,* the inclusion of rank among the independent variables reduced the standard deviations attributable to gender. Even so, "the net effect of being female" showed at significant levels in every year of the class period when put through the calculations of a regression analysis. Neither the trial court (which admitted this evidence, but minimized it as a "mere compilation of data" (A-48)), nor the court below paid any attention to this exhibit. The plaintiffs, apart from statistical evidence, had shcwed by anecdotal evidence that women faculty were consistently hired in ranks below men with the same or similar qualifications.

Plaintiffs went even further to show statistically that as to initial hirings of persons still on the faculty, but who were hired in the pre-Act period, prior to 1973, men and women without a Ph.D. or prior experience were hired, if women as lecturers, and if men, as assistant professors. See Exh. 990. This exhibit was objected to by the defendants' counsel and the court rejected the exhibit on the grounds that the exhibit contained the entering ranks of 43 people still on the faculty who were hired prior to 1973 (T. 2900-2902).

In addition, plaintiffs' studies showed that women hired during the class period waited longer than men for promotions, including women qualified by a Ph.D. (Pl. Exh. 895, T.2399-2401). In Exhibit 952, plaintiffs' expert showed a

disparity in the distribution of ranks at hire during the class period which showed that women were hired disproportionately at lower ranks than men. The defendant's expert conceded that studies showed men and women to be "unevenly distributed across ranks" (T. 5029).

It is appropriate for this Court to consider this issue. See *Valentino v United States Parcel Service,* 674 F. 2d 56, 72-73 n. 30 (CADC 1982) [absent clear evidence that rank is not discriminatory, there is no assurance that rank is an appropriate variable]. A much cited case on this issue is *Presseisen v. Swarthmore College,* 442 F. Supp. 593, (E.D. Pa. 1977) affd. 582 F.2d 1275 (3rd Cir 1978). It is cited to uphold the inclusion of rank in a regression analysis if the evidence is clear that there is no discrimination with respect to the setting of rank.

The court below in another case, *Sobel v. Yeshiva,* 839 F. 2d 18 (2d Cir 1988) cert den. ___U.S.___(1988), concluded that rank was an appropriate variable where the district court avoided the issue of burden of proof and found as a fact after a trial that rank was based on merit and was not contaminated by the elements of sexual discrimination. This issue has been much discussed by the Circuit Courts of Appeal and the issue of burden of proof (where it is contended in a university setting that rank is a tainted variable) is ripe for decision by this Court. See [for colleges and universities]: *Coser v. Moore,* 739 F 2d 746 (2d Cir 1984); *Penk v. Oregon State Board of Higher Education,* 816 F. 2d 458, 465 n.2 (9th Cir. 1987); *Craik v. Minnesota State University Board,* 731 F. 2d 472, 479 (8th Cir. 1984); [industry]: *James v. Stockham Valves and Fittings,* 559 F. 2d 3210, (5th Cir. 1977) [government employment] *Valentino v. United States Postal Service, supra.*

This Court has not ruled on this issue, nor on the issue of burden of proof and/or persuasion in this connection. The trial court, affirmed by the court below clearly put the burden of proof on the plaintiff to show that rank was tainted. It is submitted here that plaintiff carried that burden, although the courts below found otherwise.

V

WHERE THE STANDARDS FOR PROMOTION, TENURE AND SALARY INCREASES FOR PLAINTIFF WOMEN FACULTY INVOLVED SUBJECTIVE STANDARDS IN THIS CLASS ACTION AND WHERE REGRESSION ANALYSIS TABLES ESTABLISHED DISCRIMINATION, PLAINTIFFS WERE ENTITLED TO A FAVORABLE JUDGMENT ON LIABILITY UNDER THE RULE OF DISPARATE IMPACT

The criteria for promotion, tenure or any salary increase were five: 1) effectiveness in teaching, 2) excellence in scholarship, 3) mastery of subject matter, 4) professional growth and 5) university service. There was evidence that these criteria permitted decisions to be made on the subjective opinion of department heads, faculty committees charged with recommendations, and the President of the university. Statistical evidence accepted, ignored, and excluded by the trial court attested to the discrimination against women faculty as to salaries and rank as well as shown *supra*.

The case was tried and argued in the courts below on the theory that it was a disparate treatment case. The trial court at the conclusion of the case as to the plaintiff class and the individual plaintiffs found that there was no gender discrimination at New Paltz and further that the university at no time had any *intent* to discriminate against women faculty. The trial court's rejection of the persuasiveness of the

statistical evidence, moreover, affected that court's approach to the anecdotal evidence. That court ruled consistently when gender appeared as a factor in the university's decision against a female faculty member, that the basis for the decision was "neutral," and not "pretextual."

Under the reasoning of *Watson v. Fort Worth Bank and Trust,* plaintiffs should have had the benefit of the law of disparate impact as well as disparate treatment under Title VII rulings. Under Point I above, plaintiffs have argued that *Price Waterhouse* changes the burden of persuasion and requires the defendant to come forward with evidence that the illegal factor [discrimination as to gender in this case] did not play a role in the negative decision of the employer concerning the employment grievance of the employee, and/or class of employees. In a disparate treatment case, under the standard of *Teamsters v. United States,* 431 U.S. 324,335.n. 15, (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive. Generally, however, where a regression table shows discrimination at levels of standard deviation of two or three, this has generally been assumed to mean that the intent or motive exists: otherwise the pattern or practice of discrimination would not exist. There are further rules that where the plaintiff establishes by such evidence that a prima facie case exists, the defendant has the burden of coming forward with evidence of the legitimacy of the practice which resulted in the alleged discrimination. This *McDonnell Douglas- Burdine* test was not used by the courts below because the trial court rejected plaintiffs' proof *ab initio* as sufficient for a prima facie case.

Since, however, *Watson* is now the law with regard to subjective standards applied in a Title VII discrimination case,

tiffs should have the benefit of this ruling. The five ria here used to decide whether a faculty member will be oted, receive tenure or a merit raise, are indeed subjective lards and were challenged at trial by plaintiffs who ed they were applied unfairly. Upon remand, the plaintiffs ld have the benefit of disparate impact to argue to the . It is not necessary for the plaintiffs here to show that liscrimination which resulted from the application of the ctive standards, was deliberate or intentional. It is easier y that it is historical.

CONCLUSION

Court should grant the Petition for Writ of Certiorari and he case down for briefing and oral argument

Respectfully submitted,

Eleanor Jackson Piel

36 West 44th Street
New York, N.Y. 10036
(212) 575-0797
Attorney for Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 49—August Term, 1988

(Argued: October 17, 1988 Decided: May 9, 1989)

Docket No. 88-7159

ROBERTA OTTAVIANI, Individually and on Behalf of all other persons similarly situated,

Plaintiff-Appellant,

CAROLEE SCHNEEMANN, JOAN MARIE de la COVA, DOROTHY JESSUP, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Intervenor-Appellants,

—v.—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR., in his capacity as Chancellor of the State University of New York,

Defendants-Appellees,

HARRIET KLAPPER,

Plaintiff-Intervenor-Appellee,

—v.—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, CLIFTON R. WHARTON, JR., ALICE CHANDLER, PETER VUKASIN, and THE TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK,

Defendants-Appellants.

Before:

VAN GRAAFEILAND, CARDAMONE, and PIERCE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, *Kram*, J., following a bench trial, which found in favor of defendants on all of the plaintiffs' Title VII claims.

Affirmed.

ELEANOR JACKSON PIEL, Esq., New York, New York, *for Plaintiffs-Appellants.*

JUDITH T. KRAMER, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, Jan P. Ryan, Marilyn T.

Trautfield, Assistant Attorneys General, of counsel), *for Defendants-Appellees.*

PIERCE, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, *Kram, J.*, in which the court found in favor of defendants on all of the Title VII claims asserted by individual faculty members and a class of similarly situated plaintiffs, following a lengthy bench trial.[1] The decision of the district court is published in a thorough and lengthy opinion at 679 F. Supp. 288 (S.D.N.Y. 1988), familiarity with which is assumed herein. Appellants contend the district court erred in its decision and principally attack the district court's treatment of the evidence presented in support of their Title VII claims. For the reasons that follow, we affirm.

BACKGROUND

This complicated Title VII suit was commenced by and on behalf of full-time, academic rank female faculty members at the State University of New York ("SUNY") at New Paltz ("the University") who were employed in the University's Division of Liberal Arts and Sciences at any time between academic years 1973 and 1984. The plaintiffs alleged that between 1973 and 1984, the University discriminated against female members of its faculty on the basis of gender in three separate categories: (1) placement

1 The district court ruled in favor of plaintiff-intervenor Harriet Klapper on her Equal Pay Act Claim. That decision is not challenged on appeal by defendants, and appellants rely on the favorable ruling only insofar as it supports their class-wide claims of discrimination.

in initial faculty rank at the University, (2) promotion into higher rank, and (3) salary. Judge Kram conducted a bench trial which extended over nine months on all of the plaintiffs' claims, and both parties presented extensive evidence to the court. For the sake of brevity, we will discuss only so much of the proceedings below as is relevant to our discussion of the key issues raised on appeal.

During the trial, the district court basically considered two types of evidence—objective statistical evidence and extensive "anecdotal" evidence. The statistical evidence presented by both sides consisted primarily of data produced by means of various "multiple regression analyses." Depending upon the party presenting the statistical evidence, the data was intended to either demonstrate or rebut the plaintiffs' claim of a pattern of ongoing discrimination against women within the University in all three of the contested categories.

A. *The Statistical Evidence*

Multiple regression analysis is a statistical tool commonly used by social scientists to determine the influence that various independent, predetermined factors (so-called "independent variables") have on an observed phenomenon (the so-called "dependent variable"). *See Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 621 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 702, 705-06 (1980). In disparate treatment cases involving claims of gender discrimination, plaintiffs typically use multiple regression analysis to isolate the influence of gender on employment decisions relating to a particular job or job benefit, such as salary. *See, e.g., Sobel v. Yeshiva Univ.*, 839 F.2d 18, 21-22 (2d Cir. 1988); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 324-25 & n.22 (7th Cir.

1988); *Palmer v. Schultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987).

The first step in such a regression analysis is to specify all of the possible "legitimate" (*i.e.*, nondiscriminatory) factors that are likely to significantly affect the dependent variable and which could account for disparities in the treatment of male and female employees. *See Sobel*, 839 F.2d at 20-21; *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Fisher, *supra*, at 713-14. By identifying those legitimate criteria that affect the decision making process, individual plaintiffs can make predictions about what job or job benefits similarly situated employees should ideally receive, and then can measure the difference between the *predicted* treatment and the *actual* treatment of those employees. If there is a disparity between the predicted and actual outcomes for female employees, plaintiffs in a disparate treatment case can argue that the net "residual" difference represents the unlawful effect of discriminatory animus on the allocation of jobs or job benefits. *See Palmer*, 815 F.2d at 90-91; D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 3.2, at 94 (1980); *id.* § 8.02[1], at 245-46.[2]

In this case, the parties' statistical experts each determined what factors they thought were relevant to the set-

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2 Another way in which statisticians can measure the influence of gender on a particular employment decision is by using gender as one of the independent variables in a regression analysis. For each independent variable in a multiple regression analysis, the statistician calculates a coefficient, which is a measure of the effect that the variable has on the dependent variable being examined. If the regression coefficient for gender is sufficiently *large*, then it is probative of the impact that gender has on the employment decision at issue. D. Baldus & J. Cole, *supra*, §§ 8.01 to 8.02[1], at 240-45; *see, e.g.*, *Segar*, 738 F.2d at 1261-62.

ting of salaries and rank at the University, and used those factors as independent variables in their multiple regression analyses. By accounting for all of the "legitimate" factors that could affect salary and rank in general, the plaintiffs hoped to prove that there was a net "residual" difference or disparity between the predicted and actual salaries and rank of female faculty members that could only be attributed to ongoing gender discrimination within the University. Conversely, the defendants sought to attribute observed disparities in the pay and rank of male versus female faculty members to "legitimate" factors such as unequal job qualifications.

1. *Plaintiffs' Proof of Salary Discrimination*

a. Plaintiffs' Main Salary Study

The plaintiffs' main salary study was contained in Trial Exhibit 882 and purported to demonstrate the difference in salaries between male and female faculty members at New Paltz. According to the plaintiffs' statistical expert, Dr. Mary Gray, women actually earned from $1,036 to $2,277 less than their predicted salaries in each year of the class period. The defendants challenged these findings on several grounds, but principally attacked the plaintiffs' study for its failure to include certain independent variables which the defendants claimed were influential in the setting of faculty salaries at the University.

The plaintiffs' main salary study incorporated the following independent variables: (1) number of years of full time teaching experience prior to hire at New Paltz; (2) number of years' teaching experience in academic rank at New Paltz; (3) possession of a doctorate degree; (4) number of years since obtaining the doctorate degree; (5) number of publications; (6) other experience prior to hire at

New Paltz; and (7) years of full-time high school teaching experience. The plaintiffs' statistical expert, however, did not include academic rank variables in her main salary study such as prior rank, current rank, and years in current rank. Although Dr. Gray conceded that these three factors may influence salary decisions, she maintained that academic rank itself was subject to discrimination at New Paltz, and that the use of rank variables would therefore be inappropriate.

In connection with this assertion, the plaintiffs attempted to demonstrate that female faculty members were placed in lower academic ranks at New Paltz than their male counterparts, and promoted more slowly into higher academic ranks than their male counterparts, solely because of their gender.[3] The defendants' statistical expert, Dr. Judith Stoikov, responded by attempting to prove that rank at New Paltz was not discriminatory. After considering all the evidence as to rank, the district court rejected plaintiffs' proof as "unpersuasive," and concluded that plaintiffs had "failed to prove that rank at New Paltz was discriminatory." *Ottaviani*, 679 F. Supp. at 306.

The district court's rejection of plaintiffs' claims as to discrimination in rank at New Paltz had two important consequences for the plaintiffs' case. First, the court's ruling eliminated two of the contested categories of discrimination at New Paltz, and left the salary discrimination claim as plaintiffs' only remaining Title VII claim. Second, and equally important from the plaintiffs' perspective, the court's ruling "validated" academic rank as one

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3 There are four types of "academic rank" at New Paltz; (1) professor, (2) associate professor, (3) assistant professor, and (4) instructor. Faculty members in one of these academic ranks either hold tenure or are on a "tenure track."

of the legitimate factors to consider in accounting for salary disparities between male and female faculty members. Since the court considered the academic rank of faculty members to be a legitimate influencing factor on faculty salaries at New Paltz, and since the plaintiffs' main salary study failed to include academic rank variables, the court found the plaintiffs' principal study to be fundamentally flawed and less probative of discrimination than it otherwise might have been.

b. Plaintiffs' Other Salary Studies

Apart from their main salary study, the plaintiffs had also performed salary regressions which did include rank variables. Since these other studies did include what the court considered to be most of the relevant legitimate factors which could influence salary at New Paltz, the court accordingly looked primarily to these studies to determine whether the plaintiffs had made out a prima facie case of gender discrimination.

After considering and weighing all the evidence presented, the district court reached certain conclusions with respect to both the plaintiffs' and the defendants' statistical evidence. While the district judge found some of the plaintiffs' statistical evidence "persuasive," she thought that it was insufficient to establish a prima facie case of gender discrimination. On the other hand, the district judge did *not* believe that defendants' statistical evidence was sufficient to rebut the plaintiffs' discrimination claims altogether. Since the judge found the statistical evidence to be inconclusive one way or the other, she ruled that whether or not the plaintiffs could prevail on their discrimination claims would depend upon whether the totality of the evidence adduced at trial supported a finding of discrimination. Accordingly, the district judge next con-

sidered whether the extensive anecdotal evidence proffered by plaintiffs supported their claims of discrimination.

B. *The Anecdotal Evidence*

The anecdotal evidence at trial consisted of various narrative descriptions of events at the University which the plaintiffs contended illustrated or proved that the University had discriminated against its female faculty members. Specifically, the plaintiff class members sought to establish that: (1) the University did not have a viable affirmative action program; (2) New Paltz's methods for identifying and correcting existing salary inequities from 1973 to 1984 were either flawed or non-existent; (3) the University either retrenched or eliminated faculty positions to the detriment of its female faculty members; and (4) the University demonstrated a disdain for women's issues through its handling of the Women's Studies Program at New Paltz. Eleven witnesses also testified about individual instances of alleged salary discrimination at New Paltz, which the plaintiffs contended were illustrative of the administration's policies toward women as a whole.[4]

On rebuttal, the defendants sought to negate the plaintiffs' claims through the specific testimony of University administrators and faculty members, and other types of

4 The plaintiffs presented testimonial evidence of discrimination against: three New Paltz faculty members who were neither class members nor individual plaintiffs (*i.e.*, Nancy Schniedewind, Susan Puretz, and Sheila Schwartz); four individual members of the class who had not brought individual Title VII claims (*i.e.*, Susan Lehrer, Barbara Scott, Johanna Sayre, and Samantha Joe Mullen), and four members of the class who had asserted individual Title VII claims as well (*i.e.*, Roberta Ottaviani, Dorothy Jessup, Joan Marie de la Cova, and Carolee Schneemann).

anecdotal evidence. The defendants contended that such evidence demonstrated that there were nondiscriminatory reasons for all of the actions taken by the University during the period in question which negatively affected its female faculty members, and that none of the employment practices at issue were motivated by discriminatory animus.

After reviewing the anecdotal evidence, the district judge held that the plaintiffs had not proven their Title VII claims against the University. Although she found that the anecdotal evidence supported an inference of prima facie discrimination in a few of the individual class members' cases, in each of those cases she either accepted the defendants' explanations for the pay disparities, or found that the isolated incidents of discrimination were insufficient to support the class' claim of a pattern or practice of gender discrimination. Accordingly, the district court entered judgment in favor of defendants on all of the Title VII claims.

On appeal, the appellants contend that the district court erred in its treatment and analysis of the evidence in several key respects, and that as a result, the court's finding of no discrimination was erroneous. First, appellants challenge the district court's determination that the statistical evidence was inconclusive. Appellants contend that the statistical evidence adduced at trial was more than sufficient to establish a prima facie case of gender discrimination as a matter of law. Moreover, they also contend that the district judge's decision to allow allegedly "tainted" variables such as "rank" to be used in the multiple regression analyses minimized the overall impact of defendants' alleged discriminatory treatment of female faculty members, and resulted in weaker statistical proof. Appellants

also take issue with the district court's rejection of the proffered anecdotal evidence of discrimination. Finally, appellants contend that the district court erroneously excluded or ignored evidence of pre-Title VII discrimination, in contravention of the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986).

For the reasons that follow, we hold that Judge Kram did not clearly err in finding in favor of the defendants, and we affirm the decision of the district court.

DISCUSSION

We begin by noting that the district court correctly stated the familiar legal standards to be applied in Title VII cases. Since the plaintiff class herein had raised a "disparate treatment" claim under Title VII, the claimants bore the burden of not only establishing discriminatory intent on the part of SUNY administrators, but that "unlawful discrimination [was] a regular procedure or policy followed by [the University]." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *see Coser v. Moore*, 739 F.2d 746, 749 (2d Cir. 1984) ("In order to prevail on their claim of a pattern and practice of discrimination, plaintiffs had to show by a preponderance of the evidence that [the defendant]'s 'standard operating procedure—the regular rather than the unusual practice' is to discriminate on the basis of sex.") (quoting *Teamsters*, 431 U.S. at 336).

The Supreme Court has established a three-step process for evaluating disparate treatment claims brought pursuant to Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Woodbury v. New York City Transit Auth.*, 832 F.2d 764, 769 (2d Cir. 1987). First, the

plaintiffs bear the burden of establishing a prima facie case of discrimination by a preponderance of the evidence, *McDonnell Douglas Corp.*, 411 U.S. at 802, which gives rise to a rebuttable presumption of unlawful discrimination, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 & n.7 (1981). Once they have done so, the burden of production shifts to the defendants to "articulate some legitimate, nondiscriminatory reason" for the challenged employment practice. *McDonnell Douglas Corp.*, 411 U.S. at 802. In cases where the plaintiff has relied on statistical evidence to establish a prima facie case of discrimination, the defendants may also attempt to undermine the plaintiffs' prima facie case by attacking the validity of that statistical evidence, or by introducing statistical evidence of their own showing that the challenged practice did not result in disparate treatment. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1412 (D.C. Cir. 1988) (citing *Teamsters*, 431 U.S. at 360); *Coble v. Hot Springs School Dist. No.6*, 682 F.2d 721, 730 (8th Cir. 1982). If the defendants meet this burden, the plaintiffs must then show either that the defendants' statistical proof is inadequate, or that the defendants' explanation for the challenged practice is merely a pretext for discrimination. *See Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984).

Even though the burden of production shifts to the defendants during the second stage of the process, the ultimate burden of persuasion rests always with the plaintiffs to prove their claims of discrimination. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Burdine*, 450 U.S. at 253.[5] As stated earlier,

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5 The Supreme Court's recent decision in *Price Waterhouse v. Hopkins*, 57 U.S.L.W. 4469 (U.S. May 1, 1989), does not affect our

appellants contend herein that they met their burden of proof, and that the evidence at trial clearly established a pattern and practice of discrimination by University administrators with respect to faculty rank and salary. We will consider plaintiffs' principal claims of error *seriatim*, beginning with the district court's treatment of the statistical evidence adduced at trial.

A. *Significance of Plaintiffs' Statistical Evidence*

At trial, the plaintiffs herein contended that the statistical evidence alone was sufficient to establish a prima facie case of discrimination. According to plaintiffs, female faculty members were clearly treated less favorably than their male counterparts, and that unfavorable, disparate treatment was due solely to gender bias. The district court, however, found that the plaintiffs' statistical evidence was not "statistically significant" enough to establish a prima facie case of discrimination. For the reasons that follow, we conclude that the district court did not clearly err in ruling that the plaintiffs' proffered statistical evidence was not dispositive of their Title VII claims.

As discussed earlier, plaintiffs in a disparate treatment case frequently rely on statistical evidence to establish that there is a disparity between the predicted and actual treatment of employees who are members of a disadvantaged group, and to argue that such disparities exist because of an unlawful bias directed against those employees. Not all disparities, however, are probative of discrimination. Before a deviation from a predicted outcome can be con-

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analysis of these plaintiffs' claims. *See* 57 U.S.L.W. at 4474 ("the situation before us is not the one of 'shifting burdens' that we addressed in *Burdine*").

sidered probative, the deviation must be "statistically significant."

Statistical significance is a measure of the probability that a disparity is simply due to chance, rather than any other identifiable factor. *See Segar*, 738 F.2d at 1282; *see also Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977); *Mister v. Illinois Cent. Gulf R. Co.*, 832 F.2d 1427, 1430-31 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1597 (1988). Because random deviations from the norm can always occur, *see Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1451-52 (D.C. Cir. 1988); *Palmer*, 815 F.2d at 91; *Mister*, 832 F.2d at 1430-31; Fisher, *supra*, at 705, statisticians do not consider slight disparities between predicted and actual results to be statistically significant. *See Eubanks v. Pickens-Bond Const. Co.*, 635 F.2d 1341, 1347-48 (8th Cir. 1980); Fisher, *supra*, at 706. As the disparity between predicted and actual results becomes greater, however, it becomes less likely that the deviation is a random fluctuation. When the probability that a disparity is due to chance sinks to a certain threshold level, statisticians can then infer from the statistical evidence, albeit indirectly, that the deviation is attributable to some other cause unrelated to mere chance. *See* D. Baldus & J. Cole, *supra*, § 9.42, at 191-93 (Supp. 1987); *Berger*, 843 F.2d at 1412.

One unit of measurement used to express the probability that an observed result is merely a random deviation from a predicted result is the "standard deviation." D. Baldus & J. Cole, *supra*, § 2.224, at 63; *id.* § 9.03, at 294-95; *see also Berger*, 843 F.2d at 1412; *Coates v. Johnson & Johnson*, 756 F.2d 524, 536 n.11 (7th Cir. 1985). The standard deviation "is a measure of spread, dispersion or variability of a group of numbers." D. Baldus & J. Cole, *supra*, at

359. Generally, the fewer the number of standard deviations that separate an observed from a predicted result, the more likely it is that any observed disparity between predicted and actual results is not really a "disparity" at all but rather a random fluctuation. Conversely, "[t]he greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results." *Coates*, 756 F.2d at 536 n.11; *see Woodbury*, 832 F.2d at 770; *Segar*, 738 F.2d at 1282. A finding of two standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm, and most social scientists accept two standard deviations as a threshold level of "statistical significance." *See Castaneda*, 430 U.S. at 496 n.17; *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 774 (S.D.N.Y. 1983); *Cooper v. University of Texas at Dallas*, 482 F. Supp. 187, 194 (N.D. Tex. 1979) (citing N. Nie, C. Hull, J. Jenkins, K. Steinbrenner & D. Bent, *Statistical Package for the Social Sciences* 222 (2d ed. 1975)). *aff'd*, 648 F.2d 1039 (5th Cir. 1981) (per curiam). When the results of a statistical analysis yield levels of statistical significance at or below the 0.05 level, chance explanations for a disparity become suspect, and most statisticians will begin to question the assumptions underlying their predictions.

Cogniz[illegible] of the important role that statistics play in disparate treatment cases, the Supreme Court has held that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977). The threshold question in disparate treatment cases, then, is: "[A]t *what point* is the disparity in selection rates . . . sufficiently large, or the probability that

chance was the cause sufficiently *low*, for the numbers alone to establish a legitimate inference of discrimination"? *Palmer*, 815 F.2d at 92 (emphasis added); *see Frazier*, 851 F.2d at 1452. In answer to this question, "most courts follow the conventions of social science which set 0.05 as the level of significance below which chance explanations become suspect." D. Baldus & J. Cole, *supra*, § 9.02, at 291; *see, e.g.*, *Castenada*, 430 U.S. at 496 n.17; *Frazier*, 851 F.2d at 1452; *Berger*, 843 F.2d at 1412; *Segar*, 738 F.2d at 1262. The existence of a 0.05 level of statistical significance indicates that it is fairly unlikely that an observed disparity is due to chance, and it can provide indirect support for the proposition that disparate results are intentional rather than random.[6] By no means, however, is a 5 percent probability of chance (or approximately two standard deviations) considered an "exact legal threshold." *Palmer*, 815 F.2d at 92.

In the present case, the three salary studies which the district court considered most probative of a pattern or practice of discrimination produced a range of standard deviations between approximately one and five, and of the total thirty-three standard deviation measures cited, twenty-four exceeded two standard deviations.[7] Signifi-

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6 The commentators are careful to point out, however, that no matter how great the number of standard deviations is, statistical tests can never entirely rule out the possibility that chance caused the disparity. *See Palmer*, 815 F.2d at 91; D. Baldus & J. Cole, *supra*, § 9.42, at 191-93 (Supp. 1987).

7 As discussed *supra*, two standard deviations corresponds roughly to a 1 in 20 chance that the outcome is a random fluctuation. Three standard deviations corresponds to approximately a 1 in 384 chance of randomness. Finally, a range of four to five standard deviations corresponds to a probability range of 1 chance in 15,786 to 1 chance in 742,160. M. Abramowitz & I. Steigan, *Handbook of Mathematical Functions*, National Bureau of Standards, U.S. Government Printing Office, Applied Mathematics Series No. 55 (1966) (Tables 26.1, 26.2).

cantly, however, nine of the measures cited fell below two standard deviations. Also, the negative residuals associated with being female were not significant in every year of the liability period.

Given the range of standard deviations associated with their salary regressions, the plaintiffs contended that the statistical evidence clearly gave rise to a presumption of discrimination. As discussed earlier herein, however, although the district judge found the studies to be "persuasive," she nevertheless held that these levels of "statistical significance" alone were "not sufficiently high to support a prima facie claim of salary discrimination." *Ottaviani*, 679 F. Supp. at 309.

On appeal, appellants argue *inter alia* that, as a matter of law, a finding of two standard deviations should be equated with a prima facie case of discrimination. According to appellants, the district court therefore erred in finding that they had not met their burden of establishing a prima facie case. In support of this argument, appellants point out that several courts *have* accepted two standard deviations as prima facie proof of discrimination. *See, e.g., Berger*, 843 F.2d at 1412 ("if the likelihood that a fluctuation from expected results occurred by chance is five percent or less, a statistically significant difference is proved, and a prima facie case of discrimination is established") (citing *Segar*, 738 F.2d at 1282-83); *Eldredge v. Carpenters 46 N. Cal. Counties JATC*, 833 F.2d 1334, 1340 n.8 (9th Cir. 1987) (.045 level of statistical significance (approximately two standard deviations or 1 chance in 22) sufficient to give rise to an inference that discriminatory system rather than chance is responsible for women's lower admission rates to apprenticeship program), *cert. denied*, 108 S. Ct. 2857 (1988); *Dalley v. Michigan Blue*

Cross/Blue Shield, Inc., 612 F. Supp. 1444, 1451 n.18 (E.D. Mich. 1985) ("Most courts and commentators have accepted the .05 level," or 1 in 20 probability, as indicative of statistical significance). While appellants' argument that a finding of two standard deviations should be equated with a prima facie case of discrimination under Title VII is not without initial appeal, we are constrained to reject such a formal "litmus" test for assessing the legitimacy of Title VII claims.

It is certainly true that a finding of two to three standard deviations can be highly probative of discriminatory treatment. *See Segar*, 738 F.2d at 1282-83. As tempting as it might be to announce a black letter rule of law, however, recent Supreme Court pronouncements instruct that there simply is no minimum threshold level of statistical significance which mandates a finding that Title VII plaintiffs have made out a prima facie case. *See, e.g., Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2789 n.3 (1988) ("We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination."); *see also Palmer*, 815 F.2d at 92 (noting that Supreme Court has not established "an exact legal threshold at which statistical evidence, standing alone, establishes an inference of discrimination"); *Coser v. Moore*, 739 F.2d at 754 n.3 (a significance level of 5% probability of chance "has no talismanic importance"); *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981) ("courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three"), *cert. denied*, 459 U.S. 923 (1982); D. Baldus & J. Cole, *supra*, § 9.4, at 188-89 (Supp. 1987)

(courts should use tests of statistical significance only as "an aid to interpretation" and not as a "rule of law"). Accordingly, in accordance with Supreme Court pronouncements, we must reject appellants' suggestion that this court announce a rule of law with respect to what level of statistical significance automatically gives rise to a rebuttable presumption of discrimination.

Moreover, as a practical matter, the issue of whether or not two or more standard deviations establish a prima facie case of discrimination is not pivotal in this case. It is well-established that "once a Title VII case has been 'fully tried on the merits,' the question whether the plaintiff has established a prima facie case 'is no longer relevant.' " *Mitchell v. Baldrige*, 759 F.2d 80, 83 (D.C. Cir. 1985) (quoting *Aikens*, 460 U.S. at 714-15). As the Supreme Court stated in *Bazemore v. Friday*, "the *only* issue to be decided at that point is whether the plaintiffs have actually proved discrimination." 478 U.S. at 398 (emphasis added). Despite appellants' efforts to de-emphasize on appeal what transpired at trial, the district court herein actually proceeded as though the plaintiffs had made out a prima facie case of discrimination, and it cannot be gainsaid that the plaintiffs' claims were fully litigated on the merits.

At the close of the plaintiffs' case-in-chief, the defendants moved to dismiss the action specifically on the grounds that plaintiffs had not met their burden of establishing a prima facie case. The court denied the motion without explanation, however, and directed the defendants to proceed with their case. Later, at the close of defendants' rebuttal case, the court also allowed the plaintiffs to respond to the defendants' rebuttal evidence. Accordingly, the question remaining for the district court

at the close of the entire trial was whether the plaintiffs should ultimately prevail on their Title VII claims. *See Bazemore*, 478 U.S. at 398. Since the plaintiffs fully litigated those claims, any arguments on appeal directed at whether or not plaintiffs established a *prima facie* case are arguably misleading and misplaced. *See EEOC v. Sears, Roebuck & Co.*, 839 F.2d at 312 n.9.

The net import of Judge Kram's rulings regarding the significance of plaintiffs' statistical evidence is that she found the evidence to be "persuasive" but not dispositive. Contrary to appellants' assertions, it is clear from the district judge's rulings that she did not simply ignore the statistical evidence of discrimination presented by plaintiffs. The court found this evidence sufficient to cause her to deny the defendants' motion to dismiss at the end of plaintiffs' case, and to accept rebuttal evidence from the defendants. On rebuttal, however, the defendants were able to successfully undermine the plaintiffs' case by attacking the validity of the plaintiffs' statistical evidence, and by introducing statistical evidence of their own to negate the inference of discrimination that had been raised. *Cf. Berger*, 843 F.2d at 1416 ("Mere conjecture or general assertions of inadequacies in the opponent's statistical case, without demonstrating their effect on the results, will not suffice."); *Sobel*, 839 F.2d at 34 (same).

Specifically, the defendants criticized the plaintiffs' most probative studies for excluding one factor which they claimed exerted a "highly significant positive influence[ ] on current salary," namely, whether a faculty member had held a prior, full-time administrative position at SUNY New Paltz before returning to full-time teaching. The defendants also criticized these studies because the salary regressions were "fitted" only to male faculty mem-

bers, *i.e.*, they used independent variables that were derived only from the male population. The district court noted in its opinion that a "males only regression" based exclusively on values existing only in the male population might have tended to overestimate the predicted salaries of certain female faculty members, because it might *not* have taken into account legitimate factors existing solely in the female population which could have affected the rate of pay for women teachers at the University. *See Ottaviani*, 679 F. Supp. at 307. If the predicted salary for a female faculty member was overestimated, this type of regression arguably would have overestimated the discrepancies between male and female salaries at the University. Finally, the defendants criticized these studies because they inappropriately aggregated Instructors and Assistant Professors into a single "rank." The defendants pointed out at trial that when the two ranks were combined into a single rank, the predicted salary of a female Instructor would essentially be based on the higher salary of an *Assistant Professor*, and hence the net residual difference between the predicted and actual salary of a female Instructor would be overstated. Apart from these criticisms of plaintiffs' statistical evidence, the defendants also offered persuasive anecdotal evidence to negate the plaintiffs' claims of discriminatory animus. After considering all of the evidence presented, both statistical and anecdotal, the district court simply found that plaintiffs had failed to preponderate on their claims.

Recent Supreme Court precedent has made it clear that this court can reverse such a factual determination "only if it is clearly erroneous in light of all the evidence in the record or if it rests on legal error." *Palmer*, 815 F.2d at 101 (citing, *inter alia*, *Bazemore*, 478 U.S. 385). Especially in cases where statistical evidence is involved, " 'great def-

erence is due the district court's determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue.' " *EEOC v. Sears, Roebuck & Co.*, 839 F.2d at 310 (citation omitted); *see Griffin v. Board of Regents of Regency Univ.*, 795 F.2d 1281, 1289-90 (7th Cir. 1986). As the Supreme Court cautioned in the *Teamsters* case, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 431 U.S. at 340. The district judge herein gave due consideration to all of the evidence presented, and after reviewing the record, we do not perceive a convincing basis for finding her interpretation of that evidence to be clearly erroneous. Accordingly, we affirm her rulings with respect to the statistical evidence presented.

B. *Use of Rank Variables*

In conjunction with their attack on the district court's assessment of the sufficiency of plaintiffs' statistical evidence, appellants also challenge the district court's determination that "rank" was an appropriate factor to consider in assessing pay disparities between male and female faculty members. According to appellants, if the court had rejected the rank variables and considered only those salary studies which excluded rank, then the number of standard deviations associated with their findings of discrimination would have been much greater, and their statistical proof would have been even more probative.

Although we recognize that the use of rank variables in testing for salary discrimination against women faculty members is not universally accepted, *see* Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737,

741-42 (1980); D. Baldus & J. Cole, *supra*, § 8.23, at 113-14 (Supp. 1987), in *Sobel v. Yeshiva Univ.*, this court specifically upheld the use of rank variables in a multiple regression analysis, stating that rank could be used as a legitimate factor in explaining pay disparities so long as rank itself was clearly not tainted by discrimination, 839 F.2d at 35. As the plaintiffs' statistical expert, Dr. Mary Gray, explained in her own report: "In a bias-free system, one *could use rank* as a measure of productivity since the review process for promotion or hire should evaluate teaching, scholarship and service." (Emphasis added). *See* D. Baldus & J. Cole, *supra*, § 8.2, at 114. The question to be resolved, then, in cases involving the use of academic rank factors, is whether rank is tainted by discrimination at the particular institution charged with violating Title VII's provisions. Although appellants reiterate on appeal their claim that rank at New Paltz was tainted, it is clear that the district judge accepted and considered evidence from the parties on both sides of this issue, and that she rejected the plaintiffs' contentions on this point.

At trial, the plaintiffs failed to adduce any significant statistical evidence of discrimination as to rank. As the district court stated in its opinion, the plaintiffs' studies of rank, rank at hire, and waiting time for promotion "were mere compilations of data" which neither accounted for important factors relevant to assignment of rank and promotion, "nor demonstrated that observed differences were statistically significant." *Ottaviani*, 679 F. Supp. at 306. The defendants, on the other hand, offered persuasive objective evidence to demonstrate that there was no discrimination in either placement into initial rank or promotion at New Paltz between 1973 and 1984, and the district court chose to credit the defendants' evidence. Upon review of the record, we cannot state that the court's rul-

ings in this regard were clearly erroneous. Accordingly, the district court's decision to focus primarily on those studies which included rank as an essential independent variable was not improper, and appellants' contentions to the contrary must be rejected. *See Presseisen v. Swarthmore College*, 442 F. Supp. 593, 614, 619 (E.D. Pa. 1977) (inclusion of rank variable appropriate when evidence showed no discrimination with respect to hiring and promotion), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978); *see also EEOC v. Sears, Roebuck & Co.*, 839 F.2d at 327 (court's decision to focus generally on those regression analyses which did not omit "major factors" was proper); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 603-04 (2d Cir. 1986) (trial court's reliance on studies which incorporated controversial variables not clearly erroneous, where court's decision came after "extensive testimony from experts on both sides of the issue").

C. *Anecdotal Evidence*

Appellants also contend on appeal that the district court did not give sufficient weight to the anecdotal evidence adduced at trial, and that the court should have rejected the explanations proffered by University administrators to explain pay and rank inequities as "pretextual." Our review of the anecdotal evidence, however, is limited to ascertaining whether the district judge committed clear error in making her findings. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). It is not the function of this court to reweigh the evidence anew, particularly when findings by a district court are based on in-court credibility determinations. *Anderson*, 470 U.S. at 575. Rather, under the clearly erroneous standard, we may only reject findings by the trial court when we are left with the "definite

and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

In this case, the district court found that the defendants had successfully rebutted the plaintiffs' anecdotal proof, and that, in any event, the anecdotal evidence on its face was too limited to prove class-wide discrimination. After reviewing the entire record, we do not think that the court's decision to credit the testimony of the defendants rather than that of the plaintiffs was clearly erroneous. Since the district court's "account of the evidence is plausible in light of the record viewed in its entirety," we may not overturn the findings of the court even if we might "have weighed the evidence differently," had we been sitting as the trier of fact. *Anderson*, 470 U.S. at 573-74. Accordingly, we affirm the findings of the district court with respect to the anecdotal evidence presented.

D. *Bazemore Claim*

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the Supreme Court held that employers have an obligation to eradicate employment discrimination that began prior to the effective date of Title VII (1972), if the discrimination continues into the post-1972 liability period. *Id.* at 397. The Supreme Court also stated that statistical evidence of pre-Act discrimination can be probative of ongoing, post-Act discrimination. *Id.* at 402.

On appeal, appellants contend that the district court erroneously excluded evidence of pre-Act discrimination in violation of the Supreme Court's dictates in *Bazemore*. In particular, appellants claim that the district judge improperly excluded Exhibit 990, which purported to document statistically significant evidence of discrimination

as to initial faculty rank. This claim is without merit, however. At trial, the defendants objected to the admission of Exhibit 990 not because it was offered to prove pre-Act discrimination, but because it was unreliable and incomplete. While the weakness of statistical evidence should not ordinarily preclude its admission, *see Bazemore*, 478 U.S. at 400, the Supreme Court has recognized that some statistical evidence may be so unreliable as to be irrelevant, *see id.* at 400 n.10; *see also Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir.) ("*Bazemore* . . . does not give blanket approval to the introduction of all evidence derived from multiple regression analyses."), *cert. denied*, 108 S. Ct. 158 (1987). Apparently the district judge herein thought that to be the case with respect to this particular exhibit, because she sustained the defendants' objection to its admission on the grounds that it was irrelevant and unduly confusing. Upon review of the record, we do not find the district court's decision to exclude the study to be clearly erroneous, and therefore we affirm the evidentiary ruling.

Moreover, we note that appellant's reliance on this court's decision in *Sobel v. Yeshiva University* as support for their more generalized, *Bazemore*-type claims is misplaced. In *Sobel*, the plaintiffs introduced evidence specifically designed to prove that women were discriminated against prior to the effective date of Title VII, and argued that "Yeshiva had a legal obligation to equalize women's salaries immediately upon application of Title VII to universities." 839 F.2d at 27. In the present case, even though the Supreme Court handed down its decision in *Bazemore* the same month that plaintiffs' trial was commenced, the plaintiffs did not introduce any statistical evidence of substance to prove that there was discrimination at New Paltz prior to the effective date of Title VII. Instead, nearly all

of the plaintiffs' studies focused on the class liability period, which covered the years 1973 to 1984. This is in marked contrast to *Sobel* and *Bazemore*, wherein the plaintiffs offered direct, independent proof of pre-Act discrimination. *See Bazemore*, 478 U.S. at 401; *Sobel*, 839 F.2d at 30. Accordingly, we find appellants' arguments on this point generally to be without merit.

CONCLUSION

In sum, the burden of persuasion was on the plaintiffs to prove by a preponderance of the evidence that there was a pattern or practice of discrimination at SUNY New Paltz, and they failed to meet that burden. We have considered all of the arguments presented on appeal, and find them to be without merit. For the reasons stated above, the judgment of the district court is affirmed.

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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERTA OTTAVIANI, individually and on behalf of all others similarly situated,

Plaintiffs,

CAROLEE SCHNEEMAN,

Plaintiff-Intervenor,

JOAN MARIE de la COVA,

Plaintiff-Intervenor,

DOROTHY JESSUP,

Plaintiff-Intervenor,

77 Civ. 6259 (SWK)

MEMORANDUM OPINION AND ORDER

- against -

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR., in his capacity as Chancellor of the State University of New York,

Defendants.

HARRIET KLAPPER,

Plaintiff-Intervenor,

- against -

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, CLIFTON R. WHARTON, JR., ALICE CHANDLER, PETER VUKASIN, and THE TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK,

Defendants.

SHIRLEY WOHL KRAM, U.S.D.J.

Plaintiffs in this case claim that the State University of New York at New Paltz ("New Paltz") discriminated against women in violation of 42 U.S.C. Sec. 2000e et seq. (Title VII). The Court has certified a plaintiff class, which, pursuant to a stipulation, is composed of all full-

time academic rank faculty members who were employed in the Division of Liberal Arts and Sciences at New Paltz at any time from academic years 1973 through 1984.[1/] In the same stipulation, the plaintiffs limited their claims to discrimination in salary, rank, and initial placement in rank.[2/]

Plaintiff Roberta Ottaviani is the class representative. Plaintiff-intervenors Dorothy Jessup, Joan Marie de la Cova, and Harriet Klapper are members of the plaintiff class because they were full-time academic rank members of New Paltz' Division of Liberal Arts and Sciences during the class period. Plaintiff-intervenor Carolee Schneeman is not a member of plaintiff class because she was a member of the Fine Arts Division. Each individual plaintiff brings separate claims against New Paltz which are discussed infra.

This case was tried to the Court pursuant to Fed. R. Civ. P. 52. The following are the Court's findings of fact and conclusions of law.

I. TITLE VII: GENERAL LEGAL STANDARDS

A. Burden of Proof in a Class Action

The plaintiff class claims that New Paltz treated women differently from men on the basis of sex. In order to prove such a claim of disparate treatment, plaintiff must prove discriminatory intent. See Melani v. New York City Bd. of Higher Education, 561 F. Supp. 769, 773 (S.D.N.Y. 1983). Plaintiffs must demonstrate that "unlawful discrimination has been a regular procedure or policy followed by an employer . . ." Int'l Bro. of Teamsters v. United States, 431 U.S. 324, 360 (1977). The occurrence of sporadic or isolated discriminatory acts is not sufficient; gender discrimination must be New Paltz' standard operating procedure. Id. at 336; Coser v. Moore, 739 F.2d 746, 749 (2d Cir. 1984).

A finding of classwide discrimination creates a rebuttable presumption in favor of individual claims of discrimination. Franks v. Bowman Transp. Co. Inc., 424

U.S. 747, 772 (1976); Teamsters, 431 U.S. at 359. If the class claims are unsuccessful, individual claimants may still pursue their actions, but they must satisfy the burden of proof described in the next section.

B. Burden of Proof in Individual Claims

The Supreme Court has established a three step process for adjudicating individual Title VII claims. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Id. at 802; Zahorik v. Cornell University, 729 F.2d 85, 92 (2d Cir. 1984). The burden of production then shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. If the defendant satisfies this burden, the plaintiff must show that the reason is merely a pretext for discrimination. Zahorik, 729 F.2d at 92. Although the burden of production shifts to the defendant in the second step, the burden of persuasion remains with the plaintiff throughout. Id.

McDonnell Douglas sets forth four elements a plaintiff must prove to make a prima facie showing of race discrimination: 1) plaintiff belongs to a racial minority; 2) plaintiff applied and was qualified for a job which the employer was seeking applicants; 3) despite plaintiff's qualifications he or she was rejected; and 4) the job remained open after the plaintiff was rejected and the employer continued to seek applicants with plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802. This test is flexible and should be tailored to a specific case. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, n. 6 (1981).

In fulfilling its burden of showing a legitimate reason for its action, the defendant need not prove absence of discrimination. Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980). Rather, the defendant need only show that it

acted on a neutral basis. Id. The employer's hiring practices need not be "rational, wise, or well-considered -- only . . . non-discriminatory." Powell v. Syracuse University, 580 F.2d 1150, 1157 (2d Cir.), cert. denied. 439 U.S. 984 (1978). The evidence the employer presents should be objective. Sweeney v. SUNY Research Foundation, 711 F.2d 1179, 1185 (2d Cir. 1983). Objective factors include evidence that a plaintiff's qualifications do not match those required for a job. Id. A defendant's subjective evaluation of objective criteria also is acceptable, but should be specific and not speculative. Id. at 1185-86.

A plaintiff can demonstrate that a neutral explanation is pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. Evidence of pretext includes discriminatory statements or admissions, the mix of the workforce, an atmosphere of discrimination, the employer's general practices, comparative evidence, and statistics. Penk v. Oregon State Board of Higher Education, 816 F.2d 458, 462-63 (9th Cir.), cert. denied, 56 U.S.L.W. 3246 (1987).

C. **The Relationship Between the Class Claims and the Individual Claims**

Evidence of intentional discrimination against women in individual cases is relevant to the class claims of disparate treatment. It brings statistics to life, demonstrates how college policies affected the treatment of individual women, and is proof of the state of mind of college officials. Craik v. Minnesota State University Board, 731 F.2d 465, 471 (8th Cir. 1984). Similarly, evidence of classwide discrimination is relevant to individual claims because it can demonstrate that a neutral explanation for a decision is pretextual. In short, all evidence of intentional discrimination is relevant to all claims and must be considered as a whole.

II. STATISTICAL EVIDENCE OF CLASSWIDE DISCRIMINATION

Plaintiffs assert that statistical evidence alone proves their claims of classwide discrimination. Gross statistical disparities can be sufficient to prove a prima facie case of discrimination. Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977). Statistics are not irrefutable, however, and their usefulness depends on the facts and circumstances of a particular case. Id. Statistics used in a Title VII action against a university must account for the fact that a college hires specialists on a decentralized basis. Coser, 739 F.2d at 750.

Plaintiffs' statistical expert, Dr. Mary Gray, utilized a technique known as multiple regression analysis to determine whether differences in male and female salaries were based on different qualifications or other unexplained factors. See Melani, 561 F. Supp. at 774.

A multiple regression analysis determines the influence that various factors (independent variables) have on an observed phenomena (the dependent variable). For each independent variable, the statistician calculates a coefficient, which is the effect the variable has on a dependent variable. The coefficient is derived from the data about all the faculty members, and measures, for example, the effect a year of service (the independent variable) has on salary (the dependent variable). A multiple regression analysis can determine the effect gender has on salary either by calculating a coefficient which measures the effect of gender (either male or female), or by comparing a woman's actual salary with her predicted salary. The salary is predicted by multiplying the coefficient for each independent variable by the value each variable assumes for the faculty member, and adding the results.

Even if the results of the regression demonstrate that gender influences salary, this is not necessarily relevant. Rather, the difference between male and female salaries,

measured by either the size of the gender coefficient or the difference between the actual and predicted salary, must be statistically significant. That is, the likelihood that the difference in salary is due to chance must be less than .05 percent. Melani, 561 F. Supp. 774. Stated another way, the odds must be less than one in twenty that the apparent difference is actually no difference for it to be statistically significant. This probability is also expressed in terms of "standard deviations". A standard deviation is a measure of the distance on a graph between the probability of an observed result and zero. The higher the number of standard deviations, the further the result is from the expected result, and the less likely it is.

This probability can be measured in two ways. The first, known as a two-tail test, measures the probability of the result falling on either side of a bell curve. The second, known as a one-tail test, measures the probability of the result falling on either the left or the right of the center. When measuring the results based on only one tail of the curve, the standard of statistical significance is 1.65 standard deviations. When using both tails, it is 1.96.

A. Plaintiffs' Statistical Studies

1. Plaintiffs' main salary study

Plaintiffs' exhibit 882 presents the results of the regression analysis that Dr. Gray testified best represents the difference in salary between men and women at New Paltz. Dr. Gray measured salary differences for each year of the class period, 1973 to 1984. This study indicates that women earned from $1,036 to $2,277 less than their predicted salaries for the relevant years. The standard deviations associated with this ranged from -2.72 to -6.88. Underlying this study are a number of judgments.

a. Use of rank variables

Plaintiffs' main study used the following independent

variables: number of years of full-time teaching experience prior to hire at New Paltz; number of years teaching experience in academic rank at New Paltz; possession of doctorate degree; number of years since obtaining the doctorate degree; field or discipline; number of publications; other experience prior to hire at New Paltz; and years of full-time high school teaching experience.

Dr. Gray stated that three variables -- prior academic rank, current rank, and years in current rank -- may influence salary. Dr. Gray, however, did not include these variables in her main study for two reasons. First, current rank and years in rank are under the control of New Paltz, the institution accused of discriminating against women, and thus might be "tainted" by discrimination. Second, rank is not a qualification, but a result of qualifications. The variables she used measure qualifications. Including rank variables would "double-count" the effect of the qualifications and decrease the extent of the difference between men's and women's salaries.

Dr. Gray submitted evidence of academic rank discrimination at New Paltz. First, Dr. Gray compared the number of men and women in the four academic ranks in academic years 1973 through 1984. (Pl. Exhs. 891 and 940) Her study indicates that women were disproportionately concentrated in the two lower ranks in each year of the study. This differential remained consistent when Dr. Gray accounted for possession of a Ph.D.[3/] Dr. Judith Stoikov, defendants' statistical expert, criticized this evidence as merely descriptive, not demonstrating that the results were statistically significant. Dr. Stoikov also criticized the study because factors other than a Ph.D. -- such as years at New Paltz, prior experience, and publications -- determine rank.

Second, Dr. Gray compared the rank at hire for men and women from 1973 to 1984. (Pl. Exhs. 889 and 952) The results indicate that New Paltz hired 34 women, 33 into the two lower ranks. New Paltz hired 80 men, 60 in

the lower ranks. New Paltz thus hired a disproportionate number of women into the lower ranks. Dr. Gray divided the new hires into those with and without a Ph.D. Nobody without a Ph.D. was hired into the two higher ranks. A woman without a Ph.D. was more likely than a man without a Ph.D to be hired into the lowest rank. Among those with a Ph.D., a woman was more likely than a man to be hired into the two lower ranks. On rebuttal, Dr. Gray presented a study of the statistical significance of these results. (Pl. Exh. 952A) The probability that gender had no effect on initial hire for all new hires and for those with a Ph.D. was less than .05 percent. Dr. Stoikov testified that there were not enough observations to complete a statistical study of the rank at hire results reported in exhibit 952, with the exception of faculty hired without a Ph.D. For those faculty, she found that the differences in rank at hire were not statistically significant.

Third, Dr. Gray compared the average years to promotion for men and women promoted from 1973-1984. (Pl. Exh. 895) She testified that the only promotion for which there was enough data to make a meaningful comparison was from assistant professor to associate professor. The average number of years to promotion for a woman was 8.55 years, and for a man, 7.00 years. Examining only those faculty members with a Ph.D., Dr. Gray found that the difference in years to promotion was 1.909 years. Dr. Stoikov criticized this study because it did not analyze differences in the rate of promotion.

Finally, Dr. Gray compared the results of a regression analysis which excluded rank variables with a regression which included them. (Pl. Exhs. 104 and 1028) The difference between the average female underpayments in each study is statistically significant. That is, the amount of the underpayment absorbed by the rank variables, determined by the underpayment in a study which did not use the rank variables, is statistically significant. Dr.

Gray asserts that since rank should be based on the same factors as salary, any statistically significant difference in the residuals between the rank and non-rank studies is due to discrimination in rank. Dr. Stoikov also criticized this conclusion on the ground that Dr. Gray's study did not show that rank is discriminatory, but only that men and women were unevenly distributed among rank.

b. Department chair variable

Dr. Gray testified that although New Paltz adds a stipend to the salary of the chairperson of a department, she did not include a variable to reflect this in her main salary study. (Pl. Exh. 882) Her reason was that selection of department chairs was under the control of New Paltz, and tainted by discrimination. In support of this claim, Dr. Gray presented two exhibits which list the department chairs at New Paltz by gender. (Pl. Exhs. 900 and 980) The total number of chairpersons was 53.5 men and 6.5 women. The total number of years served was 194.5 to 9.5. Dr. Gray testified that the probability that gender had no effect on this difference was less than 1 out of 1,000 (Pl. Exh. 1022). Dr. Gray also studied the distribution of department chair positions among faculty with more than 7 years of college teaching experience, since at New Paltz, most department chairs were tenured, and the waiting period for tenure was 7 years. The result was the same distribution of chairperson years between men and women as when she measured all faculty. The probability that gender had no effect was 5 out of 1,000. Dr. Stoikov criticized Dr. Gray's failure to account for department chair stipends in her main study. Dr. Stoikov testified that Dr. Gray's proof that selection to departmental chair was discriminatory was flawed because the only factor it accounts for is whether the faculty member had seven years of experience, and selection to departmental chair depends on many other factors.

Defendants also criticized Dr. Gray for failing to use a variable for prior service in an administrative position

because she did not demonstrate that women were denied administrative positions on discriminatory grounds. Defendants assert that excluding these variables from the salary regression overestimates the differentials between men and women, as both factors have a positive influence on salary (Def. Exh. S6-A, Table H) and more men than women were chairpersons and administrators.

c. "Males only" regression

Dr. Gray's main study is a "males only" regression. She calculated the coefficient for each independent variable using only the data for male faculty members. Then she multiplied each coefficient by the corresponding value for a female faculty member. She added together all of these figures; the sum is the female faculty member's predicted salary. That is, it is the salary she would be earning, based on all of her relevant qualifications, if she were a man. Dr. Gray then subtracted the woman's actual salary from her predicted salary. This was the woman's "residual", or the measure of the difference between her actual salary and the salary she would earn if she were a man. Dr. Gray repeated this process for all the class members, added all the residuals, divided by the total number of women, and derived the average female residual. This residual is the basis for calculating the degree of statistical significance.

A males only regression is different from a total population regression. In such a regression, the characteristics of the entire population, male and female, are used to calculate the coefficients for each variable. A gender variable, either male or female, is added to the list of independent variables. The size of the gender coefficient is the measure of the effect of being male or female. For example, if the gender variable equals female, and the coefficient is -$100, the effect of being female on a salary is -$100. The number of standard deviations, that is, the likelihood that gender does not influ-

ence salary, is based on the gender coefficient.

Dr. Gray preferred the males only regression because the purpose of her study was to determine if New Paltz treated men differently from women. Dr. Gray testified that the males only regression, in predicting a female's salary based on the value that the various independent variables have for a man, was superior in measuring what a woman would earn if she were paid the same as a man. The total population regression measures a woman's salary against the salary for an average person. This, Dr. Gray testified, reduces the size of the coefficients by combining the male and female values, and in turn reduces the predicted salary differential between men and women. For example, if the coefficient for a Ph.D. is $1,000 for a male and $500 for a female, and there are an equal number of males and females, the Ph.D. coefficient is $750. Dr. Stoikov, on the other hand, testified that a males only regression is not as accurate as a total population regression because it only accounts for values existent in the male population.

d. Excluding the nursing faculty

Dr. Gray did not include members of the nursing faculty in her main study, even though nurses were in the liberal arts faculty and are members of the class. Dr. Gray excluded them from her study for two reasons. First, there were no male nursing faculty, and thus there were no males with whom to compare the females. Second, she determined that although the nurses were members of the faculty of liberal arts, they had different duties and received much higher average salaries than other women on the liberal arts faculty. (Pl. Exh. 894)

New Paltz started its nursing program in 1981. There are only six nurses who are class members, and there were no more than four nurses in any year. Including the nurses in the regression thus has a minimal effect on the results. (Def. Exh. S(6), Table 20) Nevertheless, defendants argue that the nurses are members of the class, de-

cisions about their salaries were made by the same people who made decisions about the other class members, and hence they should be included in the regressions.

e. **One-tail measurements**

Dr. Gray expressed the statistical significance of the results in her main study according to both a one-tail and a two-tail test. The one-tail results demonstrated a higher degree of probability that gender was the cause of the observed salary differentials. Dr. Gray preferred the one-tail test because all the results were negative, that is, all the female residuals fell under the left tail fo the curve.

2. **Plaintiffs' other current salary studies**

Although Dr. Gray was confident that her main salary study accurately reflected the different treatment of men and women at New Paltz, she completed other regressions which incorporated variables or employed methodologies which were not reflected in her main study.

a. **Total population regression**

In the second half of exhibit 882, Dr. Gray did a total population regression using the same variables as in the main study. She measured the net effect of being male. In each year, men had a higher salary than predicted. The number of standard deviations and the one and two-tail probabilities were similar to those in the main study, and all were statistically significant.

b. **Regressions including rank variables**

Dr. Gray completed five regressions which included rank variables. The first three regressions have two parts, a males only regression and a total population regression. The fourth and fifth are a males only and total population regression, respectively. The regressions include variables for current rank (Pl. Exh. 883); current rank and years in rank (Pl. Exh. 884); current rank, years in rank, and prior rank (Pl. Exh. 885); prior rank only (Pl.

Exh. 989); and current rank with instructor treated as a separate rank, years in rank, and prior rank (Pl. Exh. 988).

In the first three regressions, the current rank variables included only three ranks: assistant professor, associate professor, and professor. Dr. Gray testified that she combined the ranks of instructor with assistant professor for two reasons. First, there were very few male instructors, and in some years there were none. In light of this, Dr. Gray felt it would be inaccurate to predict salaries of the female instructors based on the characteristics of a small number of males. Second, as expressed earlier, supra, at II. A. 1. a., Dr. Gray prepared a study which she believed demonstrated that, based on their qualifications, a disproportionate number of women were hired as instructors. By combining the ranks, she hoped to control for some of this difference. Dr. Stoikov criticized this. She testified that the result of combining rank was that a woman instructor was predicted to have the salary of a male assistant professor. This overestimates the woman's salary, and hence the differential.

Examining the males only regressions in exhibits 883 through 885, and comparing them to plaintiffs' main study (Pl. Exh. 882), yields the following observations. First, as each rank variable is added, the female residual and the degree of statistical significance consistently decrease. However, the residual remains statistically significant in a one-tail test for every year of the class period except 1984/85 in the test that includes all rank variables. The results are statistically significant under a two-tail test in all measures but three: the regression including current rank and years in rank in 1978/79 and 1984/85 (Pl. Exh. 884); and the regressions including all three variables in 1984/85 (Pl. Exh. 884).

The total population regressions which correspond to the males only regressions in exhibits 883 through 885 show a similar consistent decrease in the net effect of

being male and a decrease in the number of standard deviations. The total number of differences which are not statistically significant also decreases. The measurements which are not statistically significant under either a one or two-tail test occur in exhibit 883, 1984/85; exhibit 884, 1984/85; and exhibit 885, 1979/80 and 1984/85. Under two-tails, the differences are not statistically significant in 1978/79, 1979/80, and 1980/81 in exhibits 884 and 885.

It is also worthwhile to compare the total population regression which includes all three rank variables (Pl. Exh. 885) with the regression which includes all three rank variables and treats the rank of instructor separately (Pl. Exh. 988). The net effect of being male decreases in every year except two in exhibit 988. The net effect is not statistically significant under either tail in four of the years, 1975/76, 1978/79, 1979/80, and 1984/85. It is not statistically significant under two-tails only in 1983/84.

The final rank regression Dr. Gray presented was a males only regression in which she added only prior rank to the variables she used in her main study. (Pl. Exh. 989) Comparing the results of this regression with the main study indicates that prior rank does not account for much of the difference between male and female salaries. In 1982/83, prior rank increased the difference.

c. **Regressions including rank and department chair variables**

Dr. Gray prepared three males only regressions which consider the impact serving as a department chairperson has on salary. (Pl. Exhs. 888, 889, and 890) These studies are all variations of the males only regression in exhibit 885, which includes variables for all three ranks, so comparisons with that study are appropriate.[4/]

In exhibit 888, Dr. Gray simply added a variable for department chair. While the female residual remained negative, it decreased slightly in every year except 1983/84. The residual was not statistically significant in

1984/85 and 1978/79 under either tail, and under two-tails alone in 1979/80. In exhibit 889, Dr. Gray did not add a department chair variable. Rather, she subtracted the department chair stipends from the salaries of department chairpersons. The average female residuals were generally slightly higher than in exhibit 888, but generally not as high as in exhibit 885. The only year in which the residuals were not statistically significant was in 1984/85. Finally, exhibit 890 combines the effects of exhibits 888 and 889 by adding a department chair variable and subtracting the department chair stipend. The results of this study were virtually identical to the results reported in exhibit 888.

d. Regressions including nursing faculty

Plaintiffs' exhibit 898 is a total population regression which adds a nursing variable to the variables used in plaintiffs' main study. It should thus be compared to the total population regression of plaintiffs' main study.[5/] The male coefficients are positive in each year in exhibit 898, and are virtually identical to the male coefficients in the total population regression reported in the second part of exhibit 882.

In plaintiffs' exhibit 897, Dr. Gray adds a nursing variable to the results of the total population regression of exhibit 885, which includes all the rank variables. The results of the two regressions are virtually identical.

3. Salary at hire

Dr. Gray also reported the results of a males only regression analysis, using the same variables as in plaintiffs' main study, for faculty hired from 1973 to 1984. (Pl. Exh. 939) Females received a salary at hire that was an average of $535 less than men, a standard deviation of -2.25.

B. Defendants' Salary Studies

1. "Validation" of the rank variable

Dr. Stoikov attempted to "validate" the use of rank

variables in her salary regressions by proving that rank at New Paltz was not discriminatory. She studied the initial rank of those hired between 1973 and 1984 and promotions between 1973 and 1984.

a. Initial rank

In Table 4 of defendant's exhibit S(6), Dr. Gray determined the effect six variables had on rank at hire: possession of a Ph.D.; publications; years of prior college teaching; years of related research experience; years of other related experience; and prior rank. The results indicate that only 4.8 percent of those hired as instructors held a Ph.D. at hire, while 68.4 percent of those hired as assistant professor, and all hired as associate professors and professors, held a Ph.D. Similarly, rank at hire increased among those with one or more publications. The most influential experience variable, however, was prior college teaching: as years of prior college teaching experience increased, so did rank at hire. Finally, only one faculty member -- a male -- was hired at a rank lower than his prior rank.

Dr. Stoikov broke down these factors by gender. She determined that a higher percentage of males than females had a Ph.D. and at least one publication at hire. Males also had more years of experience in all three categories. Finally, the prior rank of women was proportionately lower than that of men: nearly three-quarters of the women held the rank of instructor or below, while less than half the men did. Conversely, more than half the men held the prior rank of assistant professor or higher compared to one-fourth of the women.

In Table 6 of exhibit S(6), Dr. Stoikov presented the results of a study of the statistical significance of the influence of various factors on initial rank. Since the initial rank variable could only assume four values -- instructor, assis-tant professor, associate professor, and professor -- Dr. Stoikov employed a "max-imum likelihood estimate" procedure known as logit or categorical

modeling, which is designed for dealing with a dependent variable with a limited number of values.[6] Dr. Stoikov also added the following variables to the test: years of hire; academic field; and gender equals female.

The statistical analysis indicates a very high probability that a woman would be hired into the predicted rank. (Table 6, col. 5) Dr. Gray divided the results into five categories. The probability that a woman would be hired correctly[7] into: 1) one of the four ranks was 63 percent; 2) one of three ranks (combining professor and associate professor) was 87 percent; 3) the rank of instructor as opposed to the other three ranks was 44 percent; 4) an entry level rank as opposed to a non-entry level rank was 100 percent; and 5) the rank of instructor as opposed to assistant professor was from 44 to 80 percent.

Dr. Stoikov concluded from her studies that gender did not influence assignment to initial rank from 1973 to 1984. She testified that entry into the two lower ranks was a function of whether one had a Ph.D. or was about to get one, and that entry into the higher ranks was a function of years of college teaching experience and prior rank.

b. Promotions

In Table 10 of defendants' exhibit S(6), Dr. Stoikov studied the probability that a female would be promoted compared to a man. She studied three different promotions: instructor to assistant professor, assistant to associate professor, and associate to professor. The factors she used in her regression analyses were years since Ph.D., years in rank, department group, and gender equals female. Dr. Stoikov concluded that gender did not have an influence on promotion. The most significant influences on promotion from instructor to assistant professor were years since Ph.D. and years in rank. Years in rank was the only factor which had a significant influence on promotion from assistant to associate professor, and none of the measured factors influenced promotion from

associate professor to professor.

Dr. Gray criticized Dr. Stoikov's attempt to "validate" rank on two grounds. First, Dr. Stoikov did not account for people placed in rank before 1973. Since half of the class members were hired before 1973, Dr. Stoikov's studies do not account for whether these women were hired into the correct rank. Thus, even if the waiting time for promotion was equal, they still might not be in the proper rank. Second, plaintiffs assert that the population Dr. Stoikov relied on was not a large enough population to produce reliable results in a categorical modeling or logit regression.

2. Salary decisions made between 1973 and 1984

a. Initial salary

Dr. Stoikov did a regression analysis of the initial salaries of all New Paltz faculty hired between 1973 and 1984. (Def. Exh. S(6), Table 11) She controlled for the same factors as in her study of initial rank, and did not include any rank variables. The results, reported at Part I of Table 11, indicate that the difference between male and female starting salary is not statistically significant.

b, Rates of salary increases

In Part II of Table 11, Dr. Stoikov measured the annual rates of salary increase. Dr. Stoikov found that the net effect of being female was positive. Females' salaries increased faster than similarly qualified males.

c. Share of discretionary increases

Dr. Stoikov also studied whether women received their "fair share" of discretionary pay[8/] from 1973 to 1984. She found that with the exception of 1977, when the percentage of women was actually higher, the percentage of female faculty receiving awards was equal to the percentage of female faculty. (Def. Exh. S(6), Table 15) Dr. Stoikov also found that the amount of the discretionary pay women received was proportionately equal. In some years women received more than their fair

amount, and in others they did not. In no year was the difference statistically significant.

3. Current salary studies: 1973-1984

Dr. Stoikov did a multiple regression analysis of salaries paid to all full-time faculty in academic rank at New Paltz from 1973 to 1984. (Def. Exh. S(6), Tables 17 and 18) Dr. Gray included the nursing faculty in her study. The variables she controlled for were: 1) year of hire (if in 1973 or later) or years at New Paltz (if hired before 1973); 2) years of prior college teaching; 3) years of other related prior experience; 4) prior rank; 5) years since Ph.D.; 6) current rank; 7) years in current rank; 8) department group; 9) prior administrative position; 10) department chair; and 11) gender equals female. Dr. Stoikov also deducted the chair stipend from the appropriate salaries. Dr. Stoikov's regressions are total population regressions.

In Table 17, Dr. Stoikov reports the female coefficient -- the effect that being female has on expected salary -- in terms of dollars. In eight years the effect of being female was negative, in four years it was positive. The range in the negative years was -$15 to -$325, and the range in the positive years was $33 to $281. In none of the years was the effect of being female statistically significant under a two-tail test. In Table 18, Dr. Stoikov reported the effect of being female in natural logarithms, that is, the percentage of total salary. In this study, the effect of being female was negative in 11 of 12 years. The range of the effect was from -2.6 to -0.1 percent. The effect of being female was not statistically significant under a two-tail test.

Dr. Gray's most persuasive criticism of Dr. Stoikov's salary was her use of a year of hire variable. Dr. Gray presented evidence that the variable was extremely volatile. The effect on salary of being hired in 1973, for example, was drastically different for each year in the period, and hence unreliable. Dr. Gray also presented

evidence that the year of hire variable did not measure what it purported to measure -- that bad budgetary years had a negative influence on salary. She showed that being hired in 1979, a year defendants contend was a poor budgetary year, had a statistically significant effect on salary in only one year, and in that year it was positive.

4. Salaries in 1971-1972

Dr. Stoikov also prepared a regression analysis of salaries paid to all full-time liberal arts faculty from 1971 to 1972. (Def. Exh. S(6), Table 23) She used the same regression technique as in Tables 17 and 18 but used different variables because she did not have as much information. She used years since Ph.D., year of hire (if hired after 1963), years at New Paltz (if hired before 1964), current rank, years in rank, department group, and gender. In 1971, the female coefficient was -$472. This was associated with -1.7 standard deviations, which is not statistically significant under a two-tail test. In 1972, the effect of being female decreased to -$263, and the number of standard deviations decreased to -0.99.

C. Conclusions from the Statistical Evidence

1. Including rank variables in the regressions

Rank is an improper variable if there is evidence that rank is discriminatory, and appropriate when there is evidence that it is not. See Valentino v. United States Parcel Service, 674 F.2d 56, 72-73, n. 30 (D.C. Cir. 1982) (absent clear evidence that rank is not discriminatory, there is no assurance that rank is an appropriate variable); Melani, 561 F. Supp. at 782-83; Presseisen v. Swarthmore College, 442 F. Supp. 593, 614, 619 (E.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978) (inclusion of rank variable appropriate when evidence showed no discrimination with respect to promotion).

The plaintiffs have failed to prove that rank at New Paltz was discriminatory. Dr. Gray's studies of rank (Pl.

Exhs. 891 and 940), rank at hire (Pl. Exhs. 899 and 952), and waiting time for promotion (Pl. Exh. 895), were mere compilations of data which neither accounted for factor (with the exception of possession of a Ph.D.) which Dr. Stoikov's studies persuasively showed lead to assignment to rank or promotion, nor demonstrated that observed differences were statistically significant. The exhibits which Dr. Gray introduced to show statistical significance (Pl. Exh. 891A which was not admitted into evidence and Pl. Exh. 952A which was) were unpersuasive. The only factor they measured was possession of a Ph.D. Dr. Gray's comparison of the regression which included rank variables with one that did not (Pl. Exhs. 1021 and 1028) proved only that rank had a statistically significant influence on salary, and that men and women were unequally distributed across the ranks. It did not show that the ranks were unfairly distributed or discriminatory. Finally, as is described more fully below, there is no evidence of discrimination in rank in individual cases either.

The defendants' statistical evidence, on the other hand, demonstrated that there was no discrimination in either placement into initial rank or promotion between 1973 and 1984. Plaintiffs' criticism of Dr. Stoikov's statistical study on the ground that it did not include a large enough population to be reliable is not well rounded. Plaintiffs failed to prove to the Court that Dr. Stoikov improperly relied on the logit and categorical modeling regression techniques. See Craik, 731 F.2d at 476, n. 14.

The plaintiffs' second criticism of Dr. Stoikov's rank validation -- that she did not account for faculty hired before 1973 -- is a more significant criticism but is nevertheless unpersuasive. Dr. Stoikov's studies do explain the rank at hire for at least half the class members, and explain the promotions for all class members during the relevant period.

2. Other variables

A regression analysis should account for holding a

departmental chair in the absence of evidence that selection to departmental chairs at New Paltz was discriminatory, as it increases a faculty member's salary.

Plaintiffs failed to prove that selection to a departmental chair at New Paltz was discriminatory. There is no evidence that New Paltz deprived women of departmental chairs on discriminatory grounds. Furthermore, Dr. Gray's studies are not persuasive. Exhibits 900 and 980 merely show that more men than women held departmental chairs. They do not show that this distribution was discriminatory. Dr. Gray's attempt to prove that the distribution was discriminatory (Pl. Exh. 1022) is also unpersuasive because it does not account for any of the factors that influence selection to departmental chairs. The study in which Dr. Gray controls for faculty with at least seven years of prior college teaching is similarly unpersuasive because it accounts for only one factor.

The defendants also showed that holding a prior administrative position had a positive influence on salary at New Paltz. It is thus also appropriate to use this variable absent some showing of discrimination. Plaintiffs did prove that all prior administrators were men, but they did not show that assignment to administrative rank was discriminatory.

Finally, the Court finds that the year of hire variable is, as plaintiffs demonstrated, too volatile to be reliable. It is also not particularly helpful. As plaintiffs have shown, it does not indicate what it is supposed to -- that salaries decreased in bad budgetary years.

3. **Males only or total population regression**

The males only regression predicts how women would be treated if they were treated the same as men, but does not account for factors which males do not possess. The total population regression accounts for factors not observed among males, but tends to underestimate any underpayment to women. The Court will view a males

only regression from the perspective that it overestimates male/female differences to some degree, and will assume that a total population regression underestimates them.

4. **Means of expressing probabilities: one-tail or two**

Dr. Gray's position is that since all male coefficients and female residuals fell under either the positive or negative side of the tail of the bell curve, the probabilities that the results were due to chance should be expressed according to a one-tail test of probability. See Brunet v. City of Columbus, 642 F. Supp. 1214, 1230 (S.D. Ohio 1986), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987). Defendant's criticism of a one-tail test is also compelling: since under a one-tail test 1.64 standard deviations equal the statistically significant probability level of .05 percent, while 1.96 standard deviations are required under the two-tailed test, the one-tail test favors the plaintiffs because it requires them to show a smaller difference in treatment between men and women. See Craik, 731 F.2d at 475-76, n. 13. This conflict pro-vides the Court an opportunity to review the standards for determining the legal significance of statistical disparities.

The Supreme Court has recognized that 2 or 3 standard deviations is generally sufficient to render data suspect to a social scientist. Castaneda v. Partida, 430 U.S. 482, 496, n. 17 (1977). Nevertheless, there is no threshold of statistical significance above which discriminatory intent is shown as a matter of law, and below which it is not sufficient. See EEOC v. American National Bank, 652 F.2d 1176, 1192 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 551 (9th Cir. 1982); Coser, 739 F.2d at 754, n. 3 (5 percent chance of probability has no talismanic significance).

A court's approach to statistical disparities should be flexible, inferring from them what it can about the exist-

ence of discriminatory intent. When reviewing statistics which show relatively small disparities, such as one to three standard deviations, a court should be cautious about drawing an inference of discrimination. Coates v. Johnson and Johnson, 756 F.2d 524, 547, n. 22 (7th Cir. 1985);EEOC v. American National Bank, 652 F.2d at 1192. When the standard deviations are small, the court's conclusions about the anecdotal evidence are particularly important to the outcome of the case. See Segar v. Smith, 738 F.2d 1249, 1278 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

The small difference between a one-tail and two-tail test of probability is not relevant. The Court will not treat 1.96 standard deviation as the dividing point between valid and invalid claims. Rather, the Court will examine the statistical significance of the results under both one and two-tails and from that infer what it can about the existence of discrimination against women at New Paltz. See Chang v. University of Rhode Island, 606 F. Supp. 1161, 1205 (D.R.I. 1985) (comparing one-tail and two-tail test results).

5. Accuracy of data

During the course of the trial, the parties disputed the admissibility of defendants' statistical reports because defendants' expert changed the data for various faculty members after she had provided it to plaintiffs' expert. The defendants assert that the plaintiffs' main studies, which do not use the changed data, are inaccurate. Only eleven pieces of data out of the thousands involved in this case are at issue. Both experts submitted studies at trial which used the data of the other expert. (Pl. Exhs. 985, 986, and 987; Def. Exhs. S(6)(B), Tables 26 and 27) The results indicated that the data differences do not make a significant difference in either study. The slight differences in each database do not affect the weight the Court accords to either experts' studies.

6. Conclusions from plaintiffs'

statistics

The Court makes the following conclusions about plaintiffs' statistical studies. First, plaintiffs' regression analyses which do not control for the variables of rank, current rank, and prior rank are not of sufficient weight to demonstrate discrimination. This includes plaintiffs' main study, exhibit 882. Plaintiffs' studies which do not include all three rank variables are not sufficient either. (Pl. Exhs. 883, 884, and 989) This also includes plaintiffs' study of salary at hire, which does not control for prior rank. (Pl. Exh. 939) Second, plaintiffs' rank regressions which also control for service as department chair (Pl. Exhs. 888, 889 and 890) are more persuasive than the rank regression that does not control for department chair. (Pl. Exh. 888) Third, even those studies that do control for department chair are slightly less persuasive because they do not control for prior administrative rank. Fourth, plaintiffs' males only regressions are acceptable, even though they exclude the nursing faculty and instructors, with the caveat that they slightly overestimate the difference in treatment.

This leaves plaintiffs' exhibits 888, 889 and 890 as their most persuasive studies. These control for education, experience, current rank, years in rank, prior rank, and department chair. In all three studies, the average female residuals are negative. The following table summarizes the range in which the standard deviations in each exhibit fall.

Total number of standard deviation measures which fall between:

	0-1	1-2	2-3	3-4	4-5	5-6	6+
Ex. 888	1	2	3	2	3	0	0
Ex. 889	0	2	3	2	3	1	0
Ex. 890	3	2	3	2	0	0	

The residuals are thus generally associated with standard deviations between one and five. Two residuals fall below one standard deviation, one residual is greater

than five standard deviations, and none are higher than six. These deviations alone, particularly in light of the caveats described above, are not sufficiently high to support a prima facie claim of salary discrimination. On the other hand, the statistics do not preclude an ultimate finding that plaintiffs have made a prima facie showing. The Court will thus consider these statistics in conjunction with other anecdotal evidence of discrimination.

7. Conclusions from defendants' statistics

The Court makes the following conclusions about defendants' main study of current salary, at Tables 17 and 18 of exhibit S(6). First, the volatility and questionable reliability of the year of hire variables renders the results somewhat questionable. Second, as a total population regression, it tends to underestimate the male/female disparities. Defendants' current salary studies demonstrate a much lesser degree of discrimination against women than do the plaintiffs'. In light of the Court's finding that the defendants' total population regressions underestimate the degree of salary differential between men and women at New Paltz, however, the residuals are not low enough that they alone rebut a finding of class-wide discrimination. They do, however, require the Court to scrutinize plaintiffs' statistical studies and other evidence very carefully.

Defendants' studies of salary decisions made between 1973 and 1984 (Exhibit S(6), Tables 11 and 15), are of limited usefulness in assessing salary discrimination because they do not account for the residual of any pre-1973 discrimination. See Bazemore v. Friday, 106 S. Ct. 3000, 3006-07 (1986).[97] These studies are relevant, however, in assessing the state of mind of the New Paltz Administration from 1973-1984, which is the class liability period. They demonstrate that the Administration did not discriminate against women in initial salary, rate of increase, or distribution of discretionary money.

III. EVIDENCE OF COLLEGE-WIDE DISCRIMINATION AGAINST WOMEN

A. Affirmative Action Program

The existence of an affirmative action program "is the antithesis of a pattern and practice of discrimination based on sex." Coser, 739 F.2d at 75 Evidence of good faith adherence to an affirmative action program is relevant to the issue of discriminatory intent. Craik, 731 F.2d at 472. The absence of a plan does not prove class-wide discrimination, but indicates that heightened scrutiny of university employment practices is appropriate. Chang, 606 F. Supp. at 1183-84. Plaintiffs attempted to prove that New Paltz did not have a viable affirmative action program.

1. The New Paltz Affirmative Action Plan

Lorraine Bagley's first responsibility as New Paltz' first affirmative action officer in 1974 was to develop an affirmative action plan. Bagley completed the plan in 1975. (Pl. Exh. 151) The plan required the affirmative action officer to review all faculty employment decisions, including hiring, contract renewal, tenure, promotion, and salary. The plan also implemented a new search procedure for all faculty searches. It required search committees to place advertisements in journals with wide circulation among minority and female teachers and students, and to submit all pertinent information about the search to the affirmative action officer. The affirmative action officer had to approve the procedures before a new faculty member could be hired. The plan also stated that New Paltz had completed a study of salary inequity among the faculty which determined that some salaries were inequitably low, and that this was not due to discrimination, but to the poor condition of the budget in the year the faculty member had been hired.

The 1975 plan did not include goals and timetables for the hiring of female faculty. Nor did it include an underutilization analysis, which compares the percentage of

women on the faculty with the percentage of women holding a doctorate nationally, and is the basis for developing goals and timetables. Bagley testified that she did not prepare an underutilization analysis because the only data available was a tabulation of the percentage of women with doctorates. She needed data which divided the women by discipline, such as history, math, and chemistry, and even further into sub-disciplines such as Asian history and Medieval history.

In 1979, the University of Colorado published data which satisfied Bagley. She did an underutilization analysis, and found that with one exception, none of the departments at New Paltz underutilized women. She thus did not prepare goals or timetables because she did not believe they were necessary. Bagley did not save this analysis.

Bagley's handling of the affirmative action plan contravened SUNY policies in two ways. First, SUNY required all its campuses to set goals and timetables. Second, SUNY required each campus to update its plan annually, and Bagley never updated the 1975 plan. (Pl. Exh. 16) She testified that she was too busy monitoring employment decisions to do so.

In 1980, New Paltz appointed Margaret Wade as affirmative action officer, and she updated the plan in 1981. (Pl. Exh. 6) This updated plan contained an underutilization analysis, goals and timetable. New Paltz underutilized women in 6 out of 30 departments, and set hiring goals accordingly. (Exh. 16, p. 53) The record does not indicate whether New Paltz achieved these goals. Nor does it disclose New Paltz' efforts, other than regular affirmative action procedures, to achieve these goals.

2. Part-time affirmative action officer

Bagley had been a full-time affirmative action officer, but New Paltz appointed Wade on a part-time basis. Prior to her appointment, Wade was an assistant profes-

sor in New Paltz' political science department. After her appointment, she remained in the department on a half-time basis. This arrangement benefited both Wade and New Paltz: it allowed Wade to continue teaching but stopped her tenure clock while she earned a Ph.D. New Paltz eliminated Bagley's $17,000 per year salary and replaced it with an annual stipend of $1,000 it paid to Wade. Wade worked as affirmative action officer approximately 25 hours per week. She spent less time monitoring searches than did Bagley, but her other responsibilities were the same.

3. Monitoring employment decisions

The record indicates that the affirmative action office was closely involved in faculty employment decisions. Whenever an opening arose, the department notified the affirmative action officer. She informed the department chair of the requirements for the search, and insured that the search was done according to the affirmative action guidelines. In 1983, this system was revised slightly. (Def. Exh. H(7)(b)) The affirmative action officer placed advertisements and received resumes herself.

The affirmative action officer also monitored promotions, tenure decisions, contract renewals, and discretionary salary increases. Bagley testified that the Administration have her lists of all faculty it considered each year. She reviewed decisions which she felt might have been unfair by comparing the personnel files of unsuccessful applicants with successful applicants. She then made any objections to the academic vice-president. If he did not concur, they took the dispute to the president, who made the ultimate decision.

4. Conclusions

New Paltz' affirmative action program was relatively weak. It did not include hiring goals and timetables until 1981. Although some of this delay might be excused by the absence of refined data, Bagley could have done a less sophisticated study and developed rough goals and

timetables. New Paltz also reduced the affirmative action officer's job to part-time in 1980 without a corresponding reduction in workload. On the other hand, the program had some strengths. The affirmative action officer discussed all employment decisions with the academic vice-president or president and had to approve all initial hires. In summary, New Paltz' uneven commitment to affirmative action requires the Court to scrutinize employment practices at New Paltz with great care.

B. Salary Equalization

1. Salaries at New Paltz: General

Each faculty member at New Paltz received an across-the-board salary increase each year. The union representing all the faculty in the State University of New York ("SUNY") system negotiated this increase with SUNY. New Paltz was not involved in these negotiations. Each faculty member was also eligible for a discretionary salary increase on an individual basis. SUNY and the union also negotiated the amount of discretionary money available to each campus.

New Paltz used a rather complex system for distributing discretionary pay increases. Many different parties made recommendations, including the academic vice-president and the Central Committee on Promotion and Salary. The final distribution of the money, however, was at the discretion of the president. New Paltz divided its discretionary salary increases into three broad categories: inequity, merit, and promotional. In the earlier years of the liability period, New Paltz also used discretionary money to pay chairpersons' stipends.

2. Methods for distributing inequity increases

New Paltz granted an inequity increase to a faculty member whose salary it determined as inequitable. New Paltz defined an inequitable salary as one which was lower than a comparable faculty member. The cause of the inequity could be anything, including discrimination.

During trial, and in the relevant documents, New Paltz asserted that inequitable salaries were due to year of hire: a faculty member hired in a bad fiscal year would generally receive a lower salary than one hired in a good fiscal year. There was no basis in the record for this explanation, and as described earlier, the statistics do not bear this out either. During the years in question, New Paltz employed various means for distributing inequity increases.

a. Academic years 1973-1975: mandatory minimum salaries

In these three years, New Paltz set minimum salaries for faculty of the same rank who had approximately the same number of years in that rank. Those faculty furthest below these salaries were eligible for inequity increases. (Pl. Exhs. 130, 174, and 280)

The amount and percentage of awards in the four different categories in the years 1973 to 1975 are as follows: (Pl. Exh. 280)

Year	Promotion	Merit	Inequity	Dept. Chair
1973/74	$ 6,400/8%	$11,975/15%	$61,190/77%	--
1974/75	$ 9,100/18%	$27,200/54%	$ 8,864/18%	$5,285/10%
1975/76	$10,500/15%	$43,300/61%	$17,400/24%	--
Totals	$26,000/12.9%	$82,475/40.9%	$87,454/43.4%	$5,285/2.6%

In two of the three years New Paltz awarded more money for merit than inequity, but overall, New Paltz awarded more inequity than merit money.

As plaintiff's expert testified, the minimum salary system has a major weakness as a remedy for salary inequities. Even if New Paltz increased a woman's salary to the minimum, her salary might still be below a comparably qualified male's salary.

b. 1976: The Kent State Salary Study

Bagley and the New Paltz Administration were unsatisfied with the minimum salary system because it did not account for factors such as date of hire, rank at hire,

promotion, and publications. (Pl. Exh. 130) Bagley recommended that New Paltz use a newly developed method, described in the Kent State Salary Study. (Pl. Exh. 780) The Kent State method was a multiple regression analysis which controlled for rank, years of service, and median years for all faculty at a given rank. (Pl. Exh. 154) Bagley used the Kent State Study to calculate the predicted salary for each faculty member at New Paltz. However, SUNY then informed New Paltz that due to budgetary constraints, no discretionary money would be available that year. New Paltz never actually applied the Kent State Salary Study.

c. 1977-1979: The AAUP Kit

From 1977 to 1979 New Paltz employed a new system: the Higher Education Salary Evaluation Kit published by the American Association of University Professors. (the "AAUP Kit") (Pl. Exh. 155) To calculate predicted salaries for women, the AAUP Kit recommended a males only regression which controlled for year of birth, highest degree, years since highest degree, and department. It recommended against using a rank variable. The AAUP Kit recommended that a college investigate the circumstances of all women whose salary fell below the predicted level.

Bagley's application of the AAUP Kit at New Paltz deviated from the AAUP recommendations in two ways. First, she included a rank variable in the study. Second, she investigated only those women whose salaries were at least .5 standard deviations below the norm in 1977 and one standard deviation below in 1979. (Pl. Exhs. 158 and 777)

d. 1980, 1981, and 1982 academic years: no method

In the 1980 school year, New Paltz decided that it would no longer employ a formal method for determining salary inequity. New Paltz determined that the AAUP Kit was no longer useful because the same women whose salaries were below the predicted level in

previous years and whom New Paltz had determined were not receiving an inequitable salary were identified by the study again that year. This reasoning is subject to criticism. The values for the variables in the AAUP Kit change each year, and thus can produce different results each year.

After New Paltz abandoned the AAUP Kit, its system for distributing equity increases was one of "self-identification." A person who felt she was receiving an inequitable salary presented her case to the New Paltz Administration which investigated and made a decision. The number of equity awards in each year under this system declined drastically. (Pl. Exhs. 914, 915, and 916)

3. **Salary study by the Committee on the Status of Women**

In 1973, Joel Swift, an assistant to the New Paltz president and the New Paltz liaison for affirmative action, asked the Committee on the Status of Women, a New Paltz women's advocacy group, to investigate possible inequities in the salaries of men and women. (P. Exh. 125) The Committee contacted all women faculty at New Paltz and asked them to send the Committee information about their rank, academic degrees, years of service and teaching experience, publications, and college service. (Pl. Exh. 395)

Approximately 32 women responded. The Committee then "paired" each woman with a similarly situated male faculty member and compared their salaries. The Committee concluded that each of the women was underpaid by an average of $1,000 a year. (Pl. Exh. 126)

The Committee submitted its report on February 7, 1974. In March, New Paltz President Stanley Coffman announced in the New Paltz "Newsletter" that among his priorities for the distribution of discretionary money that year would be to rectify salary inequities, particularly those identified by the Committee on the Status of Women. (Pl. Exh. 406) The Committee also sent a

memorandum to the Central Committee on Promotion and Salary Increase asking that it give priority in its recommendations about the distribution of discretionary money to salary inequities as well. (Pl. Exh. 127) Coffman invited the Committee on the Status of Women to participate in the deliberations about the discretionary money. (Pl. Exh. 128)

The Committee was not satisfied with the ultimate distribution of the discretionary money, feeling that New Paltz had ignored its findings. (Def. Exh. D(6); Pl. Exh. 120) The Committee also felt that New Paltz did not dedicate enough money to salary inequities. The Committee was correct in its opinion that New Paltz had no relied on the Report. Vukasin and Coffman asked Bagley to investigate the comparisons in the report. She found the faculty pairings were inappropriate as people in different departments with different degrees had been compared. Thus, New Paltz did not rely on the comparisons in the report.

4. Conclusions

It is clear to the Court that New Paltz' methods for identifying cases of salary inequity from 1973 to 1984 were flawed, improperly applied, or non-existent. On the other hand, it is also clear that New Paltz distributed large portions of its discretionary pay to redress salary inequity, including a majority of the money from 1973 to 1975. While New Paltz did not dedicate all the discretionary money to inequity increases, Dr. Stoikov's salary studies reveal that women received their fair share of all discretionary salary increases, inequity or not. See supra, Section II. B. 2. c. New Paltz' failure to use the results of the report by the Committee on the Status of Women is legitimate because the report was flawed. Finally, although New Paltz' decision to abandon a methodology for identifying inequity cases was not based on valid reasoning, New Paltz continued to distribute equity increases. In sum, New Paltz' distribution of discretion-

ary money was a flawed but good faith attempt to remedy pay inequities. It is thus evidence that New Paltz did not intend to discriminate against women.

C. Retrenchment and Non-renewals

1. Background: Faculty appointments and budgets

Full-time faculty at New Paltz either had tenure or a term contract. Tenure was a lifetime employment contract. Term contracts were for three years or less. Faculty were eligible for tenure after seven years of full-time college teaching.

New Paltz does not determine its annual budget. The governor, state legislature, and SUNY bureaucracy do. In many of the years in the liability period, they reduced or froze New Paltz' budget, and required New Paltz to reduce the number of faculty budget lines at New Paltz.

The New Paltz president, in consultation with the academic vice-president, dean and various committees, decided how, among three alternatives, to reduce faculty: attrition through retirement or resignation; retrenchment, which is the termination of a tenured faculty member; and budgetary non-renewal, which is failure on budgetary grounds to renew a term contract after it expired. Of these three methods, retrenchment is the most drastic. It means breaching lifetime contracts with faculty members who had dedicated many years of service to New Paltz in reliance on long-term employment. It also results in blacklisting by the AAUP, grievances, and lawsuits. The faculty's contract did not mandate budgetary non-renewal over retrenchment.

The president's discretion in retrenching faculty was limited to a small degree. The union contract required New Paltz to retrench faculty from a department according to seniority. New Paltz could easily manipulate this rule, however, as it was allowed to define the department it was retrenching as it wished. New Paltz could designate a department such as history to be retrenched, or a

specialty within that department, such as American history.

New Paltz also followed a number of self-imposed guidelines to implement faculty reductions. First, it attempted to retain its character as a liberal arts college. It attempted to maintain the "respectability" of such "core" liberal arts departments as philosophy and history. Second, New Paltz did not want to cut programs which attracted students to New Paltz, such as nursing, engineering, and geology. Third, New Paltz attempted to reduce faculty in a manner that would preserve its affirmative action goals. Fourth, New Paltz considered whether the student/faculty ratio in a department was low. Finally, New Paltz accounted for the extent to which a department "fed" other departments with students. For example, the student/faculty ratio in secondary education was low, and although the department was retrenched, it was not as severely retrenched as it might have been because all secondary education students took several courses in other liberal arts departments.

2. **Overall reductions and effect on women**

From 1973 to 1982, New Paltz reduced the total number of faculty budget lines from 385.48 to 309.28. (Def. Exh. V(6)(11)) It thus lost approximately 76 faculty budget lines during the bulk of the liability period. Nevertheless, the percentage of female faculty members in the liberal arts faculty actually increased from 14.9 percent in 1973 to 17.9 percent in 1984. (Def. Exh. S(6), Table 15) From 1975 to 1979, the percentage of women in the entire faculty increased from 21 to 23 percent. (Def. Exh. B(2)(h)(i) From 1973 to 1979, New Paltz renewed an equal percentage of male and female faculty contracts.

The parties scrutinized three particular years at trial. In 1976, New Paltz retrenched 9 tenured faculty members, 7 men and 2 women. (Def. Exh. V(6)(20)(a)) New

Paltz rehired one male, so that it retrenched a total of six men and two women. In 1979, New Paltz retrenched 21 tenured faculty and rehired 3, for a total of 18 retrenchments. (Def. Exhs. V(6)(20) and V(6)(20)(a)) Sixteen men and two women were the victims. Although in terms of raw numbers men were thus more severely cut than women in these two years (22 to 4), a much higher percentage of men than women had tenure (85 to 15 percent in 1975). The retrenchments in these years were thus proportionately equal.

In 1978, SUNY informed New Paltz that it would lose at least 10 faculty members in 1979. Peter Vukasin, who was the acting president, decided to "non-renew" faculty on budgetary grounds in 1978 so as to avoid retrenchment in 1979. Vukasin considered all the faculty whose contracts were up for renewal in 1978, and non-renewed 6 women and no men. (Pl. Exh. 837) He rehired one of these women, Whightman Mayo. Vukasin consulted the SUNY affirmative action office, the New Paltz affirmative action office, and various women's groups on campus about these decisions. At trial, Vukasin testified about each faculty member up for renewal in 1978, and explained his reasons for renewing or non-renewing them. His reasons were consistent, reasonable, and in accord with the guidelines described above.

3. Conclusions

The New Paltz Administration disliked eliminating faculty lines. During his testimony, Vukasin's demeanor conveyed how agonizing decisions about faculty cuts were. The evidence indicates that New Paltz reduced faculty according to legitimate factors. Although the factors were subjective and vague, New Paltz applied them consistently and after due deliberation. In some years the cuts bore more heavily on women than men, but overall women fared as well as, if not better than, men.

D. The Women's Studies Program

Disdain for women's issues and for those who concentrate on them is evidence of intent to discriminate against women. Spaulding v. University of Washington, 740 F.2d 686, 702 (9th Cir.), cert. denied, 469 U.S. 1036 (1984). Plaintiffs contend that defendants' treatment of the Women's Studies Program at New Paltz demonstrates a disdain for women's issues and raises an inference of discrimination.

1. Background

The Women's Studies Program ("the Program" or "Women's Studies") at New Paltz is an interdisciplinary program, not a department. Women's Studies has one full-time faculty member, and faculty from other departments offer courses which are cross-listed under Women's Studies. Faculty in the liberal arts, education, physical education, and fine and performing arts divisions offered courses in the Program. The Program has a coordinator, not a chairperson. The Women's Studies Steering Committee (the "Steering Committee") is the Program's governing body.

The Program has been a center of controversy at New Paltz since at least 1982, when Marleigh Grayer Ryan, dean of the Division of Liberal Arts and Sciences, refused to reappoint Nancy Schniedewind as coordinator of the Women's Studies Program. The controversy is both personal and political. Ryan clearly expressed her dislike for Schniedewind at trial. They also seem to disagree about the proper role of Women's Studies. Ryan envisions a traditional academic department which emphasizes scholarly pursuit and integration with the acceptance by the rest of New Paltz. (Def. Exh. M(7)(i)) Schniedewind, on the other hand, promoted a much more activist and political Women's Studies Program which was dedicated to fighting an oppressive society, of which she considers the New Paltz Administration a part. (Def. Exh. M(7)(i))

2. **Removal of Schniedewind as Coordinator**

Schniedewind served as coordinator of the Women's Studies Program from 1978 to 1983. In 1983, her term wascomplete, and the Steering Committee unanimously approved her reappointment. Ryan did not reappoint her. Her public explanation was that she wanted a coordinator from liberal arts and Schniedewind was from the school of education. This explanation seemed specious to Schniedwind at the time: the Program spanned all of New Paltz' divisions, including liberal arts and education. Ryan disclosed at trial that her announced explanation for Schiedewind's removal was, in fact, pretextual. The real reason Ryan removed Schniedewind was that she did not believe Schniedewind had been truthful with her. Ryan was not able to state a specific example of untruthfulness.

3. **Search for a new coordinator**

Plaintiffs complain about two aspects of the search to replace Schniedewind: the conduct of the search and the person selected as the new coordinator.

Dean Ryan appointed a separate committee to conduct the search, rather than allowing the Steering Committee to do it. The committee was composed of three persons who taught women's studies courses, and one faculty member from the history, political science, and psychology departments.

The Women's Studies representatives desired to hire a coordinator who could teach either psychology or law courses, and recommended four candidates. (Pl. Exh. 961) Dean Ryan did not hire any of the recommended faculty nor a faculty member who could teach law or psychology. Instead, Dean Ryan hired a historian, Dr. Carole Levin. Levin impressed Ryan because she received her M.A. and Ph.D. from Tufts, her specialty was British and American women's history, she had extensive teaching experience, she had taught many courses related

to women's studies such as "Society and Gender in Europe, 1250-1750 and 1750-present" and "Women and Madness", and she had a long and impressive list of publications and presentations. (Def. Exh. M(7)(i))

Ryan also insisted that the new coordinator be appointed to a line in a separate department, rather than to a line in Women's Studies. (Def. Exh. M(7)(f)) Ryan testified that this increased the credibility of Women's Studies and its coordinators with other departments and chairpersons. Ryan testified that many of the faculty would not have the same amount of respect for a person appointed full-time to the Women's Studies Program. Ryan also felt that a person appointed to a position in a traditional academic program brought stability to the Program because she would be less vulnerable to budget cuts. It seems, in fact, that Levin did achieve new credibility for the Women's Studies Program, both through the respect the faculty had for her as a scholar and through her diplomatic, non-confrontational approach. (Def. Exh. M(7)(i))

4. **Faculty commitment and reduction in lines**

Despite its interdisciplinary character and use of New Paltz faculty, the Program also has faculty members specifically appointed to Women's Studies. Plaintiffs claim New Paltz previously assigned 2.5 faculty lines to the Program, but now assigns only one line. Plaintiffs argue that it is important that the Program have its own faculty as it enables the Program to develop a core faculty and an adjunct faculty whose expertise is different from the existent New Paltz faculty. Plaintiffs also argue that the reduction in lines is evidence of New Paltz' lack of commitment to the Program. Much of the testimony at trial about this issue involved the 1982 departure of Kristin Miccio, whom plaintiffs claim had been a half-time adjunct in the Program. (Pl. Exh. 962) Plaintiffs claim that after Miccio resigned, New Paltz assigned that

half-line to another department.

Ryan's view of New Paltz' commitment to the Program and the assignment of faculty lines is different. First, she claims that Miccio's half-line had never been assigned to the Program, and that New Paltz replaced Miccio with an adjunct who teaches the same courses Miccio did. Second, rather than assigning separate faculty lines to the Program, Ryan prefers to recruit existent New Paltz faculty committed to teach Women's Studies courses for three years. Pursuant to this, she has developed a "Women's Studies Faculty", composed of faculty willing to make a three-year commitment to teaching courses in the Women's Studies Program. (Def. Exhs. M(7)(g), M(7)(k), and M(7)(1)) Those not able to make a three-year commitment can teach Women's Studies courses, but are not considered "Women's Studies Faculty". The Women's Studies Steering Committee as well as the Dean make recommendations for faculty. Ryan testified that her approach allows the Program and its students to plan their curriculum for a three-year period. The Women's Studies coordinator does not have to spend her time negotiating with the various deans for the release of faculty each year, rather the Dean does. Ryan also believes that a faculty composed of "peers" from within existent New Paltz departments, rather than of faculty outside New Paltz, has more credibility with the other faculty. Finally, Ryan believes a faculty composed of insiders is less susceptible to retrenchments and budgetary non-renewals.

5. <u>1984 Evaluation of Women's Studies</u>

In 1984, New Paltz invited two outside evaluators to review the Program. (Pl. Exh. 972) The report, while praising the Program and its faculty, criticized Dean Ryan. The report stated:

> The great majority of Program people with whom we spoke believe that Dean Ryan would be glad to see the Program dismantled or transformed into something that from their point of view would be a Women's Studies Program in name only. The Dean is widely thought

to see the present Women's Studies Program as lacking in academic credibility -- perhaps because of its commitment to a feminist perspective as a fundamental component of educational reform.

(Pl. Exh. 972 at 18-19) The report criticized Ryan for taking the following actions: 1) removing Kristin Miccio's half-line from the Program; 2) removing another faculty half-line; 3) excluding from Women's Studies those faculty unable to make a three-year commitment; and 4) removing Schniedewind as coordinator despite the Program's unanimous recommendation to reappoint her.[107]

6. Conclusions

It is clear from Dean Ryan's actions that she wants to gain more control over Women's Studies and transform it into a more traditional academic department. She removed Schniedewind as coordinator, appointed persons outside of Women's Studies to be on the search committee for a new coordinator, appointed a coordinator who was not recommended by the Women's Studies faculty, and created the "Women's Studies Faculty". It is also clear that she believes a faculty of insiders and members of traditional academic departments has more credibility than faculty who are hired as "Women's Studies" professors. Nancy Schniedewind and her supporters disagree. They seek an independent and reformist program and believe that Dean Ryan is attempting to dismantle Women's Studies and create a women's studies program in name only.

In implementing her own vision of a women's studies program, however, Ryan neither showed disdain for women's issues nor attempted to destroy the Women's Studies Program. Instead, she attempted to create what she felt was a strong and credible academic department. It is within her prerogative as dean to reject a more radical and independent women's studies program and implement her own, legitimate, though more conservative, vision. The fact that others may oppose Dean Ryan's vision of women's studies does not mean she has

disdain for women's issues. In fact the impression Dean Ryan gave the Court was the opposite. She was dedicated toward building a strong program and sincerely cared about its success. Furthermore, Dean Ryan did not show disdain for persons who taught women's studies. Based on her experience and judgment, she determined that people who taught courses about women and were appointed to a traditional academic department had more credibility with other faculty than those who were appointed to a women's studies faculty line.

The Court's role here is limited. Ryan and Schniedewind disagreed over the proper direction of women's studies. The Court, however, is not in a position to decide which is correct. Rather, as long as Ryan's version does not violate Title VII it is acceptable. The evidence shows that Ryan did not violate Title VII with regard to women's studies.

E. The Campus School

New Paltz operated an elementary school -- the "campus -- under the direction of its school of education. The campus school teachers were officially New Paltz faculty members, but they did not teach college courses, and worked full-time at the campus school. The mission of the campus school was threefold: to provide a training ground for New Paltz student teachers; to serve as an experimental school; and to help ease overcrowding in the public schools.

In 1975, in the midst of a SUNY budgetary crisis, the New Paltz Administration suggested closing the campus school. This suggestion caused a great protest, resulting in an agreement between SUNY and the protesters to undertake a five-year study of the school's usefulness. The study reported that while the campus school was a good school, it was not an educational laboratory and was not different from the public schools. Furthermore, the number of local school children had declined, the public schools were not over crowded, and the schools resented

the campus school taking students from them. The number of student teachers had also declined and local schools could accommodate them. In response to this trend, many other SUNY campus schools had already closed.

In 1982, New Paltz President Alice Chandler, after consultation with the affirmative action office and the various constituencies associated with the campus school, decided to close it. The eighteen female faculty members at the campus school were immediately terminated; three were eventually rehired. Nevertheless, the Court concludes that the decision to close the campus school is not evidence of Chandler's intent to discriminate against women. The serious impact on women is justified by the fact that the campus school no longer had a viable purpose and was a severe budgetary drain. The Court also notes that this is a discriminatory treatment case. Plaintiffs did not make a discriminatory impact claim. An analysis under such a claim might yield a different result.

IV. EVIDENCE OF DISCRIMINATION AGAINST INDIVIDUALS: FACULTY MEMBERS WHO ARE NOT MEMBERS OF THE CLASS

Plaintiffs presented evidence of discrimination against New Paltz faculty members who are not class members. The same committees and members of the administration who made decisions about class members, namely the separate committees on tenure/reappointment and promotion/salary, the academic vice-president, and the president, made employment decisions and recommendations about these faculty members. Evidence that they discriminated against non-class members is relevant in determining their intent to discriminate against the class or its members. Furthermore, the evidence presented about these faculty members demonstrates the effect on individual women of college-wide decisions regarding retrenchment, the method for redressing salary inequities, and affirmative action.

A. Nancy Schniedewind

1. Background

New Paltz hired Nancy Schniedewind in 1975 as an assistant professor in the School of Education. Her initial salary was $12,000. Schniedewind had previously taught for four years at St. Mary's State College in Maryland. New Paltz granted Schniedewind tenure in 1979 and promoted her to associate professor in 1980. She has been the coordinator of New Paltz' masters program in humanistic education since 1975, and, as described earlier, was the coordinator of the Women's Studies Program until 1983. Schniedewind received a B.A. in history from Smith College, an M.A. from Harvard University, and an Ed.D. in 1975 from the University of Massachusetts. Schniedewind has published two books (1978 and 1983) and has one forthcoming. She has published approximately 9 articles. In 1977, she won the SUNY Chancellor's Award for Excellence in Teaching.

2. Claim of salary inequity

In 1982, Schniedewind applied for a salary increase because her salary was lower than other males in her department, Educational Studies. (Pl. Exhs. 834 and 836) In support of her claim, she submitted evidence that the average male salary was higher than the average female salary at New Paltz as a whole, in the faculty of education, and in her own department. She also offered evidence that her salary was the lowest of the associate professors in her department, and only $2,031 more than a lecturer without a doctorate. Academic vice-president William Vasse asked his assistant to investigate Schniedewind's claim. She concluded that all three associate professors, and one of the assistant professors, James Yanok, were experts in special education, a field which commanded higher salaries than Schniedewind's. (Def. Exh. O(7)(7)) Vasse decided that Schniedewind's salary was not inequitable. (Def. Exh. O(7)(5) and Pl. Exh. 833)

At trial, Schiedewind testified that comparisons between herself and associate professors Spencer Salend and Joseph Trippi, both of whom taught special education, demonstrate salary discrimination. The evidence at trial regarding their experience and other qualifications in 1982 is summarized as follows:

(YEARS)	SINCE DOCTORATE	IN RANK	AT NEW PALTZ	COLLEGE TEACHING
Schniedewind	7	2	7	4
Salend	4	1	1	3
Trippi	13	9	9	8

Def. Exh. O (7) (6)

Salend was a well regarded scholar with at least 15 publications at the time. He had not published any books. Trippi had published little, if anything. (Def. Exh. O(7)(12)) Lorraine Taylor, the other female associate professor, also taught special education. She was hired in 1975, the same year as Schniedewind, at a salary of $16,000, $4,000 more than Schniedewind's. In 1982, Taylor was earning less than the other male associate professors.

3. Conclusions

The evidence plaintiffs presented is relevant in determining whether New Paltz responded adequately to claims of salary inequity after it abandoned its systematic method for doing so, and whether Schniedewind herself suffered salary discrimination. First, it is clear that New Paltz made a good-faith effort to investigate Schniedewind's claim of salary inequity. It analyzed the evidence she presented, and based on the valid grounds that Schniedewind's field did not command as high a salary as the professors to whom she compared herself, denied her request. Second, it does not appear that Schniedewind suffered discrimination. While she is a highly qualified and well regarded faculty member, the difference between her salary and that of Salend and Trippi can be explained. Trippi had more experience and he and Salend taught in a more lucrative field. These grounds

do not appear to be pretextual, as Lorraine Taylor, who teaches special education, received a significantly higher starting salary than Schniedewind.

B. Susan Puretz

1. Background

Susan Puretz is currently an associate professor in New Paltz' Physical Education Department. She taught at New Paltz intermittently from 1969 to 1973 and continuously since 1973. Puretz earned Masters' degrees in physical education/health and psychology, and an Ed.D. in 1973 in health and dance. Prior to 1973, Puretz had four years of non-college teaching experience and 6.5 years of college teaching experience.[11/] Puretz has been active on numerous committees. She has also been an active union member, having been the president of the New Paltz Chapter of the Association of United University Professors. Puretz won grants in 1978 and 1981 from the SUNY research foundation. She earned the SUNY Chancellor's Award for Excellence in Teaching in 1976. Plaintiffs presented evidence at trial that Puretz suffered discrimination in hiring, reappointment, and promotion.

2. Employment history: 1969 to 1976

New Paltz hired Puretz in temporary positions twice and released her twice: in 1969 and 1971. She claims she was not hired full-time until 1973 because the Physical Education Department replaced men with men, and women with women, and no full-time "women's" positions became available until then. She testified that in 1969, a male faculty member resigned and was replaced by a male. In 1971, two males resigned from permanent lines and were replaced by males. Two females in temporary lines resigned and were replaced by females. New Paltz finally hired Puretz into a tenure track line in 1973, to replace a woman who had resigned.

Puretz thus presents strong circumstantial evidence to support her claim that the Department's hiring policy was discriminatory. However, two of the male faculty who

resigned were men's athletic coaches and one who resigned was the athletic director. Puretz presented no evidence that she was qualified to coach men's athletics or to be the athletic director, or that any other woman applied for those positions, was qualified, and was rejected.

In 1974, Puretz' contract was up for renewal. Her department subcommittee recommended reappointment by a vote of 5-1.[12/] (Pl. Exh. 235) The Central Committee on Tenure and Reappointment recommended a two-year reappointment. (Pl. Exh. 236) Puretz' department chairperson also recommended a one-year renewal. Despite this support, Jordan Churchill, New Paltz' vice-president for academic affairs, terminated Puretz. (Pl. Exh. 230) Puretz filed a union grievance and complaints with the State Division of Human Rights ("SDHR") and the Equal Employment Opportunity Commission ("EEOC"), asserting sex discrimination as the basis for her termination. Eventually, New Paltz offered Puretz a one-year reappointment. (Pl. Exh. 336)

No evidence in the record suggests that New Paltz discriminated against Puretz with regard to her reappointment. First, she suffered no harm, since she was reappointed. Second, she presented no evidence that similarly situated males received more favorable treatment. Third, New Paltz' explanation for the termination/reappointment -- that New Paltz first intended to reduce its dance program but then received money to continue it -- stands unrebutted.

3. **Applications for promotion to professor**

In 1977, New Paltz promoted Puretz to associate professor. In 1981, 1982, 1983, and 1984, Puretz applied for promotion to professor but New Paltz rejected her application each time. Puretz filed a complaint with the SDHR in 1983 and update total of thirteen males and three females for promotion, and New Paltz promoted

eight men. In 1983, Puretz did not receive the recommendation of the Central Committee. That year New Paltz promoted one female and three males. Puretz also presented evidence that from 1975 to 1983, New Paltz promoted twenty-four men and two women to professors. In her 1984 update, Puretz stated that the Central Committee recommended four men for promotion and one woman -- herself -- and New Paltz promoted the four men and not her. Puretz stated she believed her qualifications were equal to the men who were promoted.

New Paltz stated in response that Puretz was not promoted because she was weak in three of the five criteria mandated by the SUNY Board of Trustees for promotion: scholarly ability; continuing growth; and university service. (Pl. Exhs. 352, 360, 225, and 227)

The resume Puretz submitted in connection with her promotion application is in evidence. (Def. Exh. R(4)) It contains a long list of publications. Nevertheless, the Court agrees with New Paltz that the publications do not demonstrate the scholarly ability which merits promotion to professor. The two books Puretz has published are not related to her field, and are minor publications. Her journal articles are relatively short and do not appear to make a significant contribution to her field. Puretz claims that her various newspaper articles about dance and which review performances are scholarly publications. The Court rejects this assertion. They do not satisfy New Paltz' criteria as serious works of scholarship. Puretz' record, however, does show strong service to New Paltz and adequate continuing growth. Puretz has served on numerous college committees, has been an active union member, and has attended several seminars, courses, and workshops.

Puretz testified at trial that she was at least as qualified as two men in other departments who were promoted: Professors Urbanski and Veghte. New Paltz' President Chandler testified that she promoted these two fa-

culty members because of their outstanding service. Urbanski had developed an intensive language study program which brought notoriety and money to New Paltz. He also was the first chairperson of the Foreign Languages Department, which had been created out of the separate language departments that had been ravaged by retrenchments in the late 1970's. Chandler testified that Urbanski restored morale and effectiveness to the faculty and helped create a viable department. Veghte had developed and implemented an engineering program at New Paltz. This required a great amount of time and effort -- he produced a 200 page proposal. The program was very important to New Paltz and SUNY. Its development and implementation was a great accomplishment. He also instituted a lecture series at New Paltz which brought prominent scientists to the school.

Other relevant evidence regarding Puretz' claim was adduced at trial. Margaret Wade, the affirmative action officer at the time, recommended to Chandler that she promote Puretz. The basis of her recommendation was that the number of female professors had decreased due to the retirement of numerous female professors. In 1982 and 1983, Chandler denied a promotion to professor to Arnold Lendt and William Odoneal, both of whom were in the Physical Education Department. The only full professor in the Department is a woman, Gloria Bonali. Finally, on October 31, 1985, the SDHR issued a determination that it found probable cause to believe that New paltz had discriminated against Puretz. (Pl. Exh. 254)

Plaintiffs have failed to convince the Court that New Paltz' failure to promote Puretz was discriminatory. First, Puretz' tabulation of New Paltz promotions are unconvincing as they do not compare the qualifications of the applicants and do not even indicate whether the ratio of male/female promotions was disproportionate to the number of applications. Second, the fact that Puretz was

not promoted despite the recommendations of the department subcommittee and Central Committee is not evidence of discrimination in the absence of a showing that similarly qualified males who were recommended were promoted instead. Third, Puretz did not satisfy New Paltz' criteria for promotion to professor. Although her service and growth were good, her scholarship was weak. Fourth, although Urbanski and Veghte had weak scholarship records, their service was extraordinary, meriting a promotion. Fifth, given the fact that the only professor in physical education was a woman, and New Paltz recently denied two men in the Department promotions to professor, it is unlikely that New Paltz discriminated against Puretz when it denied her application for promotion. Finally, Wade's recommendation has little weight, as it was not based on an individualized assessment of Puretz' qualifications, and the SDHR decision is only a finding of probable cause.

C. Sheila Schwartz

New Paltz hired Sheila Schwartz as an associate professor in the Department of Secondary Education in 1963. She earned her Ed.D. in 1964 from New York University, and New Paltz tenured and promoted Schwartz to professor in 1970. Schwartz is one of the more accomplished faculty members in her department, having published 13 books and over 100 articles. Many of the books are novels. She has won numerous awards, including a Fulbright-Hayes Fellowship in 1977. (Pl. Exh. 518)

Schwartz testified that although her salary is now the second highest in her department, from 1963 to 1984 her annual salary was an average of $2,000-$4,000 lower than that of other men in her department. She claims that this was due to discrimination. With only one exception, Schwartz' testimony in support of the alleged discrimination was general and conclusory. She simply testified that no other men in her department had published a book,

and some had published articles. The curriculum vitae and salaries of these faculty were introduced into evidence. (Pl. Exhs. 941, 942, 943, 944, 947, and 948)

The one exception is in the study by the Committee on the Status of Women, which compared Schwartz to Karl Budmen, a professor in Schwartz' department. (Pl. Exh. 126) Budmen's salary in 1974 was $19,003, Schwartz' was $16,967. Budmen had been a full professor four more years than Schwartz, and he had three more years of college teaching experience. Both had performed extensive university service. Budmen did not have any publications. (Pl. Exh. 943)

While these criteria demonstrate that Schwartz' salary should have been at least equal to Budmen's, there is other evidence in the record explains the difference. First, New Paltz had received many complaints about Schwartz' poor relationships with administrators and student teachers from the schools in which she supervised student teaching. New Paltz took these complaints seriously, and warned Schwartz to improve. Second, New Paltz justifiably felt that Schwartz' primary commitment was to writing, not teaching. Only later in her career did she convince New Paltz otherwise. These two facts depressed Schwartz' salary, and adequately serve to explain the differences between Budmen's and Schwartz' salaries.

V. DISCRIMINATION AGAINST INDIVIDUALS; CLASS MEMBERS

Plaintiffs also presented evidence of discrimination against individual members of the class who have not brought individual claims. This evidence is meant to illuminate the effect of New Paltz' retrenchments, affirmative action program, and inequity distributions; show the discriminatory intent of the relevant New Paltz decision-makers; and shed light on the statistical evidence.

A. Susan Lehrer

New Paltz hired Susan Lehrer in 1973 as a lecturer, which is not a tenure track position. At the time, she had

a Master's degree in sociology from the New School for Social Research and was working toward her Ph.D. Lehrer had no full-time teaching experience prior to coming to New Paltz. In 1974, New Paltz promoted Lehrer to instructor, which is a tenure track position. In 1977, Lehrer failed her oral examinations and the New School released her as a Ph.D. student. Despite this, New Paltz, with great reservation and on several conditions, reappointed Lehrer in the same year. (Def. Exh. C(5)(12)) In 1980, Lehrer obtained a Ph.D. from New York University, and New Paltz granted her tenure and promoted her to assistant professor. She did not produce any publications until 1982. (Pl. Exh. 459)

Lehrer claims that her salary was lower than similarly situated men in her department. In 1982, for example, her salary ($19,257) was lower than Harold Jacobs' ($22,428) and Irwin Sperber's ($21,109). (Pl. Exh. 272) Lehrer identified a third man whom she claims had comparable qualifications but who received a higher salary than her: Howard Johnson. She also claims that New Paltz' procedure for remedying salary inequities did not identify her salary inequity.

The qualifications of the relevant people are as follows. Harold Jacobs started at New Paltz in 1971 as an assistant professor. He had earned all the requirements for a Ph.D. from the University of California at Berkeley, but had not completed his dissertation. He had taught for two years as a visiting assistant professor at Berkeley, had published ten articles, and eventually earned his Ph.D. in 1978. Irwin Sperber began teaching at New Paltz in 1972 as an assistant professor with all Ph.D. requirements from Berkeley except the dissertation. He had taught for four years as an assistant professor at Berkeley, published ten articles, and earned his Ph.D. in 1975. Finally, Howard Johnson had a Bachelor's degree, experience with inner city social organizations, and was an expert in jazz history.

The evidence in the record demonstrates that Lehrer's claims of salary discrimination is without merit. Sperber's and Jacobs' higher salaries were justified as they had more teaching experience, longer service at New Paltz, more extensive scholarly activity, and earlier receipt of a Ph.D. They also held a higher rank than Lehrer.[13] Lehrer had no publications and had failed the oral examinations for her Ph.D.

Any negative difference between Lehrer's and Johnson's salary is also justified. Although Johnson did not have a Master's degree, Peter Vukasin, the academic vice-president at the time, testified that Johnson's significant experience -- he was in his 50's when hired at New paltz -- was an adequate substitute for a Ph.D. Further, Vukasin testified that very few people had Johnson's expertise. The Court credits Vukasin's explanation for Johnson's salary.

Finally, New paltz made a good faith effort to decrease the differential between Lehrer's and the males' salaries. Lehrer received a promotional salary increase in 1980, and inequity increase of $1,125 in 1981, and two merit increases of $750 each in 1983 and 1984.

B. Barbara Scott

Barbara Scott claims that New Paltz discriminated against her in salary, promotion, rank, and term of appointment. Scott also compares herself to Irwin Sperber and Harold Jacobs.

New Paltz hired Barbara Scott as a teacher's assistant in 1971. She had no prior college teaching experience and no publications at the time. In 1972, New Paltz hired Scott as a parttime instructor in sociology. She received a Master's in sociology from the New School in the same year. In 1973, New Paltz reappointed her to another one year term despite the fact that her department recommended her for at least a two-year appointment. New Paltz also rejected her application for promotion to assistant professor. Scott complained about the one year

appointment and the refusal to promote. (Pl. Exh. 476) Her complaint included an undocumented assertion that other men at New Paltz without a Ph.D. held the rank of assistant professor. She also made an unsupported assertion at trial that most men in the Sociology Department received two year contract renewals.

New paltz renewed Scott in 1975 for a two year term. It also rejected her application for promotion once again, despite recommendations from her department and department chairperson. (Pl. Exhs. 475, 477, and 478) New Paltz reappointed her again for one year terms in 1977 and 1978.[14/] In 1979, Scott obtained her Ph.D. from the New School for Social Research. Vukasin assured Scott that she could apply for tenure and promotion simultaneously, and that her tenure consideration would not be prejudiced by the fact that she was an instructor. (Def. Exh. E(5)(8)) New Paltz granted Scott tenure and promoted her to assistant professor in 1979.

In 1983, Scott applied for a promotion from assistant to associate professor. Scott, however, chose not to submit her application to the Central Committee on Promotion and Salary Increase. She feared that due to the "political" climate on campus, the Central Committee would recommend against promotion, and she did not want to risk a negative recommendation. New Paltz rejected Scott's application on the ground that she had bypassed the Central Committee, and Scott filed a union grievance. In 1984, Scott reapplied for promotion according to the proper procedures and New Paltz granted it.

New Paltz' explanation for granting Scott short renewal terms and for not promoting her in 1974 and 1975 was that she had not completed her course work for her Ph.D. The record indicates that this explanation is not a pretext: in 1979, after Scott earned a Ph.D., New Paltz promoted and tenured her. Similarly, New paltz' explanation for not promoting Scott in 1983 -- that she did not follow proper procedures -- is not a pretext, as demo-

nstrated by the fact that when Scott followed the proper procedures in 1984, New Paltz did promote her. Finally, any comparison of salary or rank Scott makes between herself and Sperber or Jacobs is without merit. As described above, both had more experience, more training, and were more accomplished than Scott in the relevant time period.

C. Johanna Sayre

Johanna Sayre taught in the German Department at New Paltz from 1969 when she was hired as an instructor until 1975, one year after New Paltz denied her tenure. She presented evidence that New Paltz discriminated against her in salary and tenure. For the purpose of showing discrimination, she compared herself to Pablo Borau, an assistant professor in the Spanish Department, and Jean Carlo Traverso, an assistant professor in the French Department.

The evidence indicates that Sayre's salary was generally less than Borau's and Traverso's from 1969 to 1975. The differences ranged from a few hundred to a thousand dollars. (Pl. Exh. 589) Traverso's and Sayre's credentials were somewhat similar: neither had a Ph.D. or publications, and both had a similar amount of college teaching experience. (Pl. Exh. 126) Borau's qualifications were also similar to Sayre's. The defendants did not explain the differential. It thus appears that Sayre has demonstrated a possibility that she suffered salary discrimination.

The basis of Sayre's tenure discrimination claim is that in 1974 and 1975, New Paltz considered three faculty members for tenure who did not a Ph.D.: Traverso, Borau, and herself. New Paltz tenured Borau and Traverso, but not Sayre. The evidence demonstrates that although New Paltz' decision was harsh, it was not discriminatory.

Both the German Department and Dr. Hans Webber, the chairperson of the Department, recommended Sayre

for tenure. (Pl. Exhs. 571 and 572) The Department's recommendation stated that Sayre was an effective, dedicated teacher, and noted that she had not yet completed her dissertation. The Department stated that she was making progress and should complete it "in the foreseeable future, i.e., in the next year or so."

The Central Committee on Tenure and Reappointment, however, recommended against tenure, because "the evidence of Mrs. Sayre's work on the dissertation has not indicated significant progress to warrant confidence in its completion within the next academic year." (Pl. Exh. 513) Webber criticized this recommendation because it only considered Sayre's scholarly ability and did not consider growth, teaching, or service. (Pl. Exh. 565)

On June 14, 1974, New Paltz informed Sayre that it would not make a decision about her tenure until August 31, and that New Paltz would ask her to document her progress on the dissertation. (Pl. Exh. 576) On June 17, Jordan Churchill, the New Paltz academic vice-president, confirmed that New Paltz would not make its decision until August 31. He told Sayre that by August 26 she should "supply the President with documentation of progress toward completion of the doctorate together with a specific schedule for completion should the doctorate not be completed by that time." (Pl. Exh. 577)

On August 21, Sayre sent a letter to New Paltz President Stanley Coffman stating that she would complete her dissertation by June of 1975. She also asked for a brief extension of the deadline to provide more specific documentation, because the members of the German Department at Syracuse would be on vacation until August 26. (Pl. Exh. 578) Coffman denied the extension and denied Sayre tenure because she did not have a Ph.D. He considered her letter of August 21 to be unresponsive because she merely made a conclusory statement that she would finish her dissertation. She did not describe how far along she was. He stated there was no

basis for granting an extension because she had already had two months to provide the documentation. Sayre was to be terminated at the end of the 1975 academic year.

Sayre completed her dissertation in the spring of 1975 and notified New Paltz. The Central Committee reconsidered its decision to deny tenure and recommended it contingent on a successful dissertation defense. (Pl. Exh. 586) Coffman, however, refused to reconsider. (Pl. Exh. 588) He testified that it was very unusual to do so and that there were severe budgetary pressures, particularly in the foreign language division, not to reverse the decision. Peter Vukasin, who had replaced Churchill as academic vice-president, testified that reconsideration would have set a bad precedent, as faculty would then think they had an extra year to earn tenure. Vukasin also was aware that New Paltz had to retrench the German Department in 1976, and Sayre, as the junior faculty member, would be the first to go.

Traverso was up for tenure in 1974 and did not have a Ph.D. Traverso received the recommendation of his department and the department chairperson, and unlike Sayre, the Central Committee recommended Traverso for tenure stating that he was rapidly approaching completion of his doctorate. (Def. Exh. R(5)(4)) The New Paltz Administration also received a letter dated August 5, 1974, from Rev. Robert Sealy, S.J., of the Modern Languages Department at Fordham University, where Traverso was studying. The letter described Traverso's dissertation in detail, praised it, and stated that Traverso had completed one chapter. In light of this information, New Paltz granted tenure to Traverso. Traverso did not receive his Ph.D. until 1977. New Paltz granted tenure to two other faculty members in 1974 who did not have a Ph.D. -- one man and one woman -- because they provided adequate documentation that they were making progress on their dissertations.

In 1975, New Paltz considered Borau for tenure. He also did not yet have a Ph.D. New Paltz, however, granted him tenure. Vukasin testified that the reason Borau received tenure was that Vukasin received a telegram from the university in Spain where Borau was studying indicating that he had completed his dissertation and that he would be defending it in June.

Based on this evidence, the Court concludes that New Paltz did not discriminate against Sayre. First, she lacked an essential credential for tenure, a Ph.D. Second, New Paltz did not treat her unfairly in relation to Borau and Traverso. Even though neither had a Ph.D., they received tenure because they documented their progress, and Sayre failed to, even though she had the opportunity. Third, in the same year that New Paltz denied tenure to Sayre, it granted tenure to another woman who did not have a Ph.D. because she adequately documented her progress. Finally, New paltz' budgetary pressures were real: after Sayre's termination, New Paltz did not ever hire another faculty member to teach German.

D. Samantha Joe Mullen

New Paltz hired Samantha Joe Mullen as an instructor in the French Department in 1964, promoted her to assistant professor in 1968, tenured her in 1972, and retrenched her in 1976. Mullen asserts discrimination in salary and termination.

For purposes of showing salary discrimination, Mullen compared herself to Traverso and another faculty member in the French Department, Albert Nahon. From 1969 to 1973, Mullen's salary was higher than Traverso's. (Pl. Exh. 791) In 1974, Traverso's salary exceeded Mullen's by $227. Nahon's salary was $1,000 more than Mullen's. All three faculty members held the same rank, Mullen wassenior to both of them, and only Mullen held a Ph.D. Mullen received a merit increase of $300 and an equity adjustment of $450 in 1975. (Pl. Exh. 792) These increases did not satisfy Mullen that the differential had

been remedied.

Based on the evidence before the Court,it appears that Mullen has demonstrated pay discrimination. Her qualifications were superior to those of Traverso and Nahon, and defendants have presented no evidence to explain the difference.

On the other hand, the evidence indicates that New Paltz did not discriminate against Mullen when it retrenched her. New Paltz decided to retrench a line in the French Department in 1976. New Paltz thought that Mullen and Nahon, the junior tenured members of the French faculty, both had been tenured in 1972. In such circumstances, the New Paltz president had discretion in deciding whom to retrench. President Coffman chose to retrench Nahon. However, when New Paltz informed the SUNY administration of its decision, SUNY rejected it, and required New Paltz to retrench Mullen. Unknown to New Paltz, Nahon had won a grievance in 1973 which changed the effective date of his tenure for sabbatical and retrenchment purposes to 1971. (Def. Exh. F(6)(1)) Mullen was thus junior to Nahon, and had to be retrenched instead of him.[15/] Since New Paltz wanted to retrench Nahon but was forced to retrench Mullen, it did not intentionally discriminate against Mullen when it retrenched her against its will.

VI. INDIVIDUAL TITLE VII CLAIMANTS

A. Roberta Ottaviani

New Paltz hired Roberta Ottaviani as an instructor in the Speech Department in 1967. New Paltz denied her tenure in 1973, and terminated her in 1974. Ottaviani presented evidence in support of five claims at trial: discrimination in salary, rank, promotion, duration of contract renewals, and tenure. For the following reasons the Court finds her claims without merit.

1. Tenure

In order to prove a prima facie case of tenure discrimination, a plaintiff must establish that: 1) she was a mem-

ber of a protected group;[16/] 2) she was qualified for tenure; and 3) she was denied tenure in circumstances permitting an inference of discrimination. Zahorik v. Cornell University, 729 F.2d 85, 92 (2d Cir. 1984). A plaintiff may show she is qualified for tenure by proving that "some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question." Id. at 93-94. Plaintiff must demonstrate she is qualified for lifetime employment, not merely that she is qualified to continue as a non-tenured faculty member. Liberman, 630 F.2d at 64. Methods of showing an inference of discrimination include departures from procedural regularity or conventional evidence of bias. Zahorik, 729 F.2d at 93.

If plaintiff establishes a prima facie case, the burden of production is shifted to the defendants to "bring forth evidence that they acted on a neutral basis." Lieberman, 630 F.2d at 65. Defendants may satisfy this burden by providing testimony, with whatever supporting evidence deemed desirable, that plaintiff's scholarly ability, mastery of subject matter, or professional growth was not sufficient to merit tenure. Id. at 65-66.

Once the defendant articulates a neutral basis for the tenure denial, the burden falls to the plaintiff to show that the reason was a pretext. Namenwirth v. Bd. of Regents of the University of Wisconsin, 769 F.2d 1235, 1240 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986). In doing so, evidence of a comparative nature, such as the fact that similarly situated males were granted tenure, is appropriate. Id. Nevertheless, in assessing such comparative evidence, the Court must be wary not to intrude on the prerogative of a college to tenure whom it deems appropriate. Lieberman, 630 F.2d at 67-68. A plaintiff may also show pretext by showing that defendant's explanation is not worthy of belief, Namenwirth, 769 F.2d at 1240, or not logical, Zahorik, 729 F.2d at 94.

a. Prima facie case

In order to qualify for tenure at New Paltz, a candidate must satisfy the five criteria of the Board of Trustees: mastery of subject matter; effectiveness in teaching; scholarly ability; effectiveness of University service; and continuing growth. (Joint Pre-Trial Order, Statement of Undisputed Facts, Par. 36) A number of different committees and individuals review each candidate according to these criteria, and provide recommendations. The New Paltz president makes the ultimate decision.

The Speech Department's Subcommittee on Tenure and Promotion recommended Ottaviani for tenure. (Pl. Exh. 464) The Subcommittee stated that Ottaviani met each of the five criteria as follows: 1) mastery of subject matter -- Ottaviani held an M.A. in speech pathology and a Certificate of Clinical Competence in speech pathology; 2) effectiveness in teaching -- students judged Ottaviani an effective teacher, and she was well organized and dedicated to her students; 3) service -- Ottaviani was chairperson of the SUNY Caucus on Women's Rights and Chairperson of the SUNY Faculty Senate Committee on Fair Employment Practices; 4) and 5) scholarship and growth -- Ottaviani attended various workshops and was studying for a doctorate at the University of Michigan.

The chairperson of Ottaviani's department, Perry Baisler, also recommended tenure. (Pl. Exh. 421) Regarding scholarly growth and mastery of subject matter, Baisler indicated that Ottaviani was enrolled at Michigan as a "pre-candidate" for a Ph.D. in speech and that she had earned 8 credits with a B+ average. She had also recently attended a course on voice disorders. Baisler also stated that Ottaviani's colleagues felt she was an effective teacher, and prepared careful course outlines and materials. Finally, Baisler stated that Ottaviani had a very deep commitment to equal rights for women, and by supporting women's causes had made a considerable contri-

bution to SUNY and New Paltz.

The Central Committee on Tenure and Reappointment, however, recommended denying tenure to Ottaviani. (Pl. Exh. 422) The basis for the recommendation was that Ottaviani's file demonstrated limited evidence of professional growth and that her actual progress on her Ph.D. during the previous six years did not suggest any firm commitment to pursue it with diligence.

The evidence is clear that Ottaviani's record of scholarship, growth, and mastery of subject matter was weak. She had only eight credits toward a Ph.D., no publications, and participated in very few professional seminars. Nevertheless, since the Speech Department and Dr. Baisler recommended tenure, the Court will give Ottaviani the benefit of the doubt and find that for the purpose of proving a prima facie case, Ottaviani was qualified for tenure. See Zahorik, 729 F.2d at 95 (case for tenure stronger since department and an ad hoc committee recommended plaintiff for tenure).

There is evidence, albeit weak, from which the Court can infer discriminatory motive. Ottaviani testified that the chairperson of the Central Committee said he thought Ottaviani was hired because she was "cute". Ottaviani testified that another member of the Committee stated that her activities on behalf of women's rights should not be considered as university service. There is also evidence in the record that various faculty members considered Ottaviani an irritant because of her work for women's rights.[17/] New Paltz also had previously tenured male members of the Speech Department who did not hold a Ph.D.[18/] Ottaviani has thus proved a prima facie case of tenure discrimination.

b. Defendants' explanations

President Coffman testified that he denied tenure to Ottaviani because she had done so little work toward earning her Ph.D. during her six years at New Paltz -- she had earned only 8 credits when Coffman made his

decision to deny tenure -- that there was no evidence she would obtain it. He was also disturbed that she had not responded earlier to the Administration's numerous warnings to obtain a Ph.D.[19]

Coffman's basis for determining that Ottaviani required a Ph.D. to have mastery over her subject was sound. Coffman sought advice from Dr. Baisler, who informed him that a Ph.D. is considered the terminal degree in Ottaviani's field. (Pl. Exh. 433) Vukasin, who was not the academic vice-president at the time but who was familiar with the decision, also testified that Ottaviani had not demonstrated to New Paltz that she had embarked on a directed and organized program towards obtaining a Ph.D. The defendants have thus articulated a neutral basis for denying tenure to Ottaviani.

c. **Pretext**

Ottaviani attempted to show that defendants' explanation was pretextual in two ways. First, she presented evidence that New Paltz was wrong in thinking she had not made sufficient progress toward obtaining a Ph.D. Second, she attempted to prove that two males in the Speech Department -- Fred Maulucci and Donald Wildy -- had made similar progress yet received tenure.

Ottaviani registered in the graduate program at the University of Michigan in the summer of 1972. (Pl. Exh. 311) She earned 8 credits that summer, and was listed as a "pre-candidate", which indi-cates that Michigan had not yet approved a course of study for a doctorate. (Pl. Exh. 312) Ottaviani registered for 8 more credits at Michigan in the summer of 1973, and was still listed as a "pre-candidate". (Pl. Exh. 313) Ottaviani also registered for a statistics course at SUNY Albany in the fall of 1973. (Pl. Exh. 465) In September of 1973, Michigan approved Ottaviani's plan of study for a Ph.D. (Pl. Exhs. 314 and 491)

At the time New Paltz was considering Ottaviani's tenure application in the spring of 1973, however, she

had attended Michigan for only one summer, earned only 8 credits, was a "pre-candidate", and had not yet developed an approved Ph.D. plan. This is the evidence of progress toward the doctorate that New Paltz Actually had before it when it decided to deny tenure.

After the tenure denial, Ottaviani sought reconsideration and submitted additional evidence: her 1973 Michigan transcript and a letter of acceptance from SUNY Albany. (Pl. Exhs. 429 and 465) She did not submit proof that she was a formal Ph.D. candidate at Michigan. Coffman, with the concurrence of the vice-president for academic affairs, refused to reconsider her case. He stated in a letter: "I do not believe ... we can do what we would essentially be doing in your case, which is awarding tenure to a person almost exclusively for University service and with little regard to progress toward the degree, which represents the initial base for establishing professional competence." (Pl. Exh. 434)

The Court finds that New Paltz reasonably believed Ottaviani would not complete her doctorate, because the evidence that she would was very weak. Coffman's determination that Ottaviani had not made sufficient progress toward earning a Ph.D. is reasonable. Coffman was an experienced college administrator and testified based on his experience that faculty who had made little progress toward earning a Ph.D., and who made that progress only when the tenure decision was approaching, were unlikely ever to earn the Ph.D. The Court credits this testimony.

In 1970, New Paltz granted tenure to Donald Wildy, a male member of the Speech Department. At the time, Wildy did not have a Ph.D., but had earned 51 credits toward the degree. He had also received a fellowship the previous year from the City University of New York to pursue his studies, and had spent an entire year there. Since Wildy had progressed on his Ph.D. much further than Ottaviani had, the fact that he received tenure

without holding a Ph.D. does not demonstrate that New Paltz' reason for denying tenure to Ottaviani was pretextual.

In 1975, New Paltz granted tenure to Fred Maulucci, another male in the Speech Department who did not hold a Ph.D. Three factors differentiate Maulucci from Ottaviani so as to render a comparison unfruitful.

First, New Paltz determined, based on the evidence before it, that Maulucci had made sufficient progress toward earning a Ph.D. Baisler sent a letter to Vukasin stating that Maulucci had earned 64 graduate credits, had embarked on a formal doctorate program at Pennsylvania State University, and had completed a qualifying examination. (Def. Exh. A(6)(3)) Maulucci also submitted a statement which indicated he had earned a total of 64 post-Masters credits. He earned 48 credits prior to admission to Penn State's doctoral program in 1972, 40 credits at Penn State, and 24 credits at other SUNY colleges. Based on the recommendation from Baisler, Coffman reasonably thought that all 64 credits counted toward Maulucci's doctorate.[20/] Vukasin testified that he was also convinced of Maulucci's progress by the fact that he proposed a specific plan for completion of the Ph.D. (Def. Exh. A(6)(4))

Second, Maulucci held a joint appointment in the Speech Department and the campus school, with one-third of his time assigned to the campus school. His main duty at the campus school, directing the remedial speech program, did not require a Ph.D. (Def. Exh. A(6)(3), recommendation of the Central Committee) In the Speech Department, his main responsibilities were supervising and coordinating student teachers and serving as a clinician in the College Speech Clinic.[21/] Baisler was adamant that a Master's degree was a sufficient terminal degree for this. (Def. Exh. A(6)(3), recommendation of Perry Baisler) The Central Committee disagreed. (Def. Exh. A(6)(3)) Nevertheless, these exhibits

show that Baisler, the Speech Department, and the Central Committee were optimistic about Maulucci's prospects for earning a Ph.D., more so than they had been about Ottaviani.

Unlike Ottaviani, Maulucci received the recommendation of every committee and person which considered his tenure application. In Maulucci's case, this included recommendations from the Dean of Education, the Subcommittee on Tenure from the Campus School, and the principal of the Campus School. (Def. Exhs. A(6)(3) and A(6)(4)) The recommendations from Baisler and the Speech Department were especially strong.

Finally, defendants offered comparative evidence that the reason for for denying tenure to Ottaviani was not pre-textual. In 1973, New Paltz denied tenure to Robert Grosshans, a male member of the Speech Department, on the grounds that he had not made sufficient progress toward obtaining a Ph.D. Like Ottaviani, Grosshans had received the recommendation of the Speech Department and Baisler, but did not receive tenure. (Pl. Exh. 437)

2. Promotion

Ottaviani applied for promotion from assistant to associate professor in 1973, and New Paltz denied the promotion. Ottaviani claims that New Paltz denied the promotion due to sex discrimination. The Zahorik tenure discrimination test, described supra, is properly applied to a claim of promotion discrimination. Chang, 606 F. Supp. at 1253. The Court finds that Ottaviani has failed to prove a case of promotion discrimination under this test.

New Paltz evaluates applications for promotion according to the same five criteria it uses for tenure decisions. The same cast of characters reviews applications for promotion with one exception: the Central Committee on Promotion and Salary Increases replaces the Central Committee on Tenure and Reappointment.

Ottaviani applied for promotion from assistant to as-

sociate professor in 1971, 1972, and 1973, and New Paltz rejected her application each time. In 1971, Dr. Baisler recommended against promotion because Ottaviani had not made substantial progress toward her doctorate. (Def. Exh. P(1)(23)) Baisler stated, "I think Mrs. Ottaviani understands that in my opinion her continued academic advancement will depend in a large measure upon further formal study in her discipline." The Speech Department also recommended against promotion on the basis that Ottaviani had not adequately demonstrated progress toward obtaining a Ph.D. (Pl. Exh. 445) The Department made clear that it had previously told Ottaviani of the need to demonstrate progress toward obtaining a Ph.D. if she expected promotion. In 1972, Baisler and the Speech Department once again recommended against tenure on the same grounds: lack of progress toward a doctorate. (Pl. Exh. 446 and Def. Exh. P(1)(21))

In 1973, the Speech Department recommended promotion because Ottaviani had registered in a Ph.D. program and had made progress toward earning the degree. (Pl. Exh. 447) Baisler recommended against promotion, once again due to lack of progress toward the doctorate. (Def. Exhs. P(1)(14) and P(1)(16)) The Central Committee on Promotion and Salary Increase concurred with Baisler. (Def. Exh. P(1)(15))

Ottaviani has failed to demonstrate that she was qualified for promotion to associate professor. In 1971 and 1972, her department and its chairperson, after careful consideration of her qualifications, recommended against tenure. In 1973, the Speech Department changed its recommendation, but Baisler and the Central Committee continued to recommend against tenure. The basis for the Speech Department's change of heart -- Ottaviani had registered in a Ph.D. program -- does not convince the Court that her qualifications had changed sufficiently to merit promotion.

Even had Ottaviani proved a prima facie case, New Paltz articulated a neutral basis for the denial of promotion: lack of progress toward a Ph.D. Ottaviani attempted to prove pretext with comparative evidence. Wildy was promoted to associate professor in 1970 and Maulucci was promoted to associate professor in 1982, both without a Ph.D. However, Wildy had progressed much further toward a Ph.D. than Ottaviani had. Maulucci was promoted as a reward for preparing and securing approval for a Master's program in communication disorders, a project New Paltz had been working on for ten years.

3. **Duration of Renewals**

Ottaviani received a one-year contract from New Paltz in 1967. After that, she was eligible for reappointment for a term of one to three years. Ottaviani received a one-year contract renewal in 1968, a two-year renewal in 1969, and one-year renewals in 1970, 1971, and 1972.[22/] She claims that New Paltz should have granted her contract renewals for at least two years, and that their failure to do so was discriminatory.

Ottaviani failed to prove that she was qualified for a two-year contract renewal. In 1970 and 1971, the Speech Department and Dr. Baisler recommended one-year reappointments. (Pl. Exhs. 302, 497, and 499; Def. Exh. P(1)(34)) The basis for the recommendation was that she had not made sufficient progress toward her Ph.D. to warrant a longer appointment.

Ottaviani asserted that her one-year renewals were discriminatory because Maulucci received two-year reappointments in 1970, 1972, and 1974. The Speech Department recommended Maulucci for two-year renewals despite the fact that he did not have a doctorate. (Pl. Exh. 498) The two-year renewals he received were in recognition of his great value as a faculty member. He served in both the campus school and the Speech Department, and coordinated the Department's student teaching program.

4. Initial Rank

Ottaviani was hired as an instructor; Maulucci as an assistant professor. Ottaviani claims that the difference in rank is due to sex discrimination. This claim is without merit. Maulucci's qualifications for his job when hired were superior to Ottaviani's for her job when she was hired. Maulucci held a Certificate of Clinical Competency, Ottaviani did not. He had more non-college teaching experience than Ottaviani. New Paltz also felt that Maulucci was more highly qualified for his responsibilities at New Paltz -- supervising student teachers -- because he had a number of years of experience do-ing so. This explanation is not pretextual, since New Paltz hired Donald Wildy, who did not have a Ph.D., as an instructor.

5. Salary discrimination

Ottaviani presented evidence that her annual salary was consistently lower than Maulucci's and Wildy's. She claims that the discrepancy is due to sex discrimination. Since all three faculty members were members of the Speech Department, this discrepancy is evidence of discrimination. Merrill v. Southern Methodist University, 806 F.2d 600, 606-07 (5th Cir. 1986).

Nevertheless, the evidence indicates that the salary differences were due to a legitimate factor -- Wildy and Maulucci were more qualified than Ottaviani. Both were further advanced in their Ph.D. studies. Maulucci's qualifications have already been described. Wildy, whom New Paltz hired to teach courses in speech and dramatic presentation, was also more qualified than Ottaviani in his field. He had directed a drama program for one year at SUNY Buffalo, directed twelve plays, acted in twelve plays, given four studio performances, and taught high school for five years.

B. Dorothy Jessup

New Paltz hired Dorothy Jessup in 1973 as an assistant professor in the Sociology Department. In 1977, New

Paltz President Stanley Coffman denied tenure to Jessup. Jessup appealed this decision through the SUNY grievance procedure, and SUNY Chancellor Clifton Wharton overturned the decision and ordered that Jessup be appointed as a visiting assistant professor for two years and reconsidered for tenure after that. In 1979, New Paltz granted tenure to Jessup. She claims that the 1977 denial was due to sex discrimination.[23/] For the following reasons the Court finds her claims are without merit.

1. Prima facie case

Applying the Zahorik test for tenure discrimination, there is no question Jessup is a member of a group Title VII protects. The record also contains evidence which shows that Jessup was qualified for tenure under the Zahorik standard. The chairperson of the Sociology Department, Dr. Vanderlyn Pine, the tenure subcommittee of the Sociology Department, and the Central Committee on Tenure and Reappointment all recommended Jessup for tenure. (Pl. Exhs. 102, 386, 387, and 487)

The favorable recommendations were not without qualification. Dr. Pine noted two criticisms of Jessup's teaching effectiveness: at times she was disorganized and confusing, and on occasion she required too much work from the students. Dr. Pine felt that Jessup was improving. Dr. Pine also stated that Jessup's publication record was not strong but she had recently submitted an article for publication to the Sociology of Education ("the journal"). Dr. Pine stated that the journal had rejected the article, but had asked Jessup to revise and resubmit it. Dr. Pine was optimistic that the journal would accept the revised article for publication.

The Sociology Department recommended Jessup for tenure "[w]ith departmental division and some reservations. ..." (Pl. Exh. 386) The Department's vote was 6-4-1 in favor of tenure. The recommendation stated that Jessup was popular with students and especially dedicated to students with poor academic backgrounds. The

Committee also stated that Jessup was willing to acknowledge and correct shortcomings in her pedological efforts.

The record also contains evidence which raises a suggestion of discrimination. Pursuant to a grievance Jessup filed with the affirmative action officer charging discrimination, an ad hoc affirmative action grievance committee found a possibility that her tenure denial was due to sex discrimination. (Pl. Exh. 99) Furthermore, in response to Jessup's complaint alleging sex discrimination, the SDHR found probable cause to believe that New Paltz had discriminated against Jessup. (Pl. Exh. 98)

2. New Paltz' explanation

Coffman explained the reasons for the denial in a letter to Jessup dated August 31, 1977. (Pl. Exh. 105) First, Coffman stated that Jessup's scholarly record was weak. Her only publications were a contribution to an edited volume and a book review. Coffman was critical of the article Jessup had submitted to the Sociology of Education: it had not been accepted; it was an elaboration of her dissertation; and it had seemingly been published solely under the pressure of tenure. Second, the reports on Jessup's teaching were "mixed". In her favor were her dedication and willingness to work with students who had poor academic records. Against her were poor command of subject matter, organization, and clarity of presentation. Third, Coffman stated it was "not unimportant" that a significant proportion of the members of the Sociology Department concluded that Jessup had not satisfied tenure standards.

Coffman testified at trial that he examined Jessup's file very carefully before reaching his conclusion. The information in Jessup's file clearly indicated that her article had not yet been accepted for publication. While Pine and the Speech Department both were optimistic about the article's eventual publication, Coffman had a differ-

ent view, based primarily on letters Jessup received from Sociology of Education on December 23, 1976 and May 4, 1977. (Def. Exhs. O(5)(12) and Q(5)(11)) The letter of December 23, 1976 states that while the paper had merit, it is "far too long, and containing too much material, tabular as well as verbal, which turns the reader away from your main points." The letter suggested a "major overhaul of the paper" which would include eliminating footnotes, clarifying "extremely misleading" figures, rewriting the manuscript, and cutting it in half. The letter invited Jessup to revise and resubmit the article. Jessup did so, and the letter of May 4, 1977 stated that the revised paper was a "substantial improvement" but needed a "substantial reorganization". The letter concluded that the journal believed Jessup would "have something publishable on the next round ... ." Coffman's judgment that the response from the journal to Jessup's article was not positive, which was based on his considerable experience, is a reasonable one.

Vukasin recommended to Coffman that he deny tenure to Jessup. His main reason for doing so was lack of publications and mixed teaching reviews. Vukasin also testified that he read her article, and was not impressed because it was a rehash of Jessup's dissertation and made self-evident conclusions. It is also clear that Vukasin gave much thought to his recommendation, and found it one of the most difficult he had to make.

"[D]eficient scholarship is a legitimate, non-discriminatory reason to deny ... tenure." Lynn v. Regents of the University of California, 656 F.2d 1337, 1344 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982). Coffman's and Vukasin's testimony that Jessup's scholarship was inadequate to merit tenure satisfied New Paltz' burden of production. Lieberman, 630 F.2d at 65. Similarly, mixed teaching reviews are also a legitimate basis for denying tenure, and the record indicates that Jessup had mixed reviews.

3. Pretext

Jessup's attempt to show pretext has two parts: 1) New Paltz' explanation is not worthy of belief because an ad hoc committee which reviewed her union grievance determined that she was entitled to tenure; and 2) an ad hoc affirmative action committee which investigated her affirmative action grievance concluded that New Paltz possibily discriminated against her.

Pursuant to her right under the union contract, Jessup filed a grievance about the tenure denial with the SUNY chancellor. After she filed her grievance, the Chancellor convened an ad hoc advisory committee, composed of one member selected by Jessup, one by New Paltz, and one by both of them. The Committee conducted an extensive investigation which included a review of all the documentary evidence and interviews of the relevant faculty and administrators.

The committee issued its report on December 13, 1977, and, by a vote of 2-1, recommended that Jessup be granted tenure. (Pl. Exh. 307) The Committee did not observe Jessup while teaching, but based on their interviews, concluded that she was an effective teacher. The Committee also reviewed Jessup's scholarly ability. By that time the Sociology of Education had accepted Jessup's article for publication, and based in large part on this, the committee concluded that she had demonstrated sufficient scholarly ability.

Despite this report, the Court finds that Coffman's and Vukasin's decision was justified. First, when New Paltz informed Jessup that it denied her tenure on August 1, 1977, her article had not yet been accepted, and Coffman reasonably believed that it would not be. Even if the article had been accepted when New Paltz was considering Jessup, or even if Coffman's belief that it would not be was unreasonable, Vukasin's judgment, which the Court accepts, was that the article was not of sufficient quality to merit tenure.[24] Second, the

Committee's review of New Paltz' decision was de novo: it simply determined whether or not Jessup was entitled to tenure based on its own investigation and judgment. The Court, however, is not determining whether Jessup was entitled to tenure, but whether she was qualified, and if so, whether the decision denying her tenure was reasonable, non-pretextual, and non-discriminatory. The Court concludes that it was.

Finally, the Committee's perspective on this decision is different from the Administration's. While the Committee was concerned with a single tenure decision, New Paltz was concerned with the implication of its decision for the faculty and future tenure decisions. Vukasin testified that he was attempting to improve the scholarly productivity of the New Paltz faculty, and denying tenure to those faculty who did not publish was a means of doing this. The Committee also was not making a long term commitment to Jessup, while New Paltz would be. Once again, the Court is unwilling to interfere with Vukasin's and Coffman's considered judgment that it would be unwise to make such a commitment to a faculty member with mixed teaching reviews and limited scholarly ability.

Jessup also filed a grievance with Lorraine Bagley, who found no evidence of sex discrimination. (Pl. Exh. 93) Jessup pursued her affirmative action grievance to the next step, forming an ad hoc affirmative action grievance committee. In a report issued April 24, 1978, the Committee found that "sex discrimination has possibly occurred in the decision to deny tenure to Dr. Dorothy Jessup." (Pl. Ex. 99) The Committee found that the credentials of Dr. Charles Leinenwebber, a professor in the Sociology Department who received tenure in 1973, and Jessup's, were equal.

The evidence in this case indicates that the fact that New Paltz tenured Leinenwebber is not evidence that its explanation for denying tenure to Jessup was pretextual.

Coffman and Vukasin testified that Leinenwebber was a superior scholar. He had already published six articles and another had been accepted for publication.

Defendants themselves presented evidence that their explanation for not tenuring Jessup was legitimate. In the same year, New Paltz also denied tenure to Warren Fish, a male member of the Geography Department. Like Jessup, Fish received positive recommendations from his department, department chairperson, and the Central Committee. Also like Jessup, New Paltz denied tenure to Fish because he had no publications. Like Jessup, Fish pursued a union grievance, received a two-year appointment as a visiting professor, and ultimately received tenure. Jessup's claim of tenure discrimination is without merit and is dismissed.

C. Joan Marie de la Cova

New Paltz hired Joan Marie de la Cova in 1973 as an instructor in the Spanish Department. Her starting salary was $10,500. She had a Master's degree and was enrolled in a Ph.D. program at Columbia University. New Paltz granted de la Cova two-year contracts in 1975 and 1977. In 1978, the year before she was eligible for tenure, New Paltz informed de la Cova that it would not renew her contract in 1979 for budgetary reasons. de la Cova claims that New Paltz discriminated against her in termination, salary, promotion, and initial rank.

1. Termination

de la Cova's qualifications for renewal are not in issue. New Paltz terminated de la Cova for budgetary reasons, not because she was not qualified for renewal. Even if de la Cova's qualifications were in issue, she would satisfy the Zahorik test: the Spanish Department, its chairperson, the Central Committee, and the Women's Studies Program all recommended a one-year renewal. (Pl. Exhs. 610, 611, 632, and 635) Once New Paltz terminated de la Cova only one woman was left in the Spanish Department, raising an inference of discrim-

ination. de la Cova has thus established a prima facie case.

New Paltz has articulated a neutral basis for the termination. SUNY informed New Paltz in 1978 that it would lose a number of lines in 1979. Vukasin, who was acting president in the spring of 1978, decided to attempt to avoid retrenchment in 1979 by non-renewing a number of contracts on budgetary grounds in 1978.[25/] Vukasin decided to eliminate one line in the Spanish Department because student enrollment was decreasing and it was over-staffed. Vukasin explained this to de la Cova in a letter dated August 21, 1978. (Pl. Exh. 618) The record indicates that Vukasin carefully reviewed each faculty member whose contract was due for renewal in 1978, assessed the student enrollment trends in his/her department as well as the department's programmatic needs, and made his decisions as to which lines to cut accordingly. This considered judgment is entitled to the Court's deference.

de la Cova claims that New Paltz could have terminated Edgar Rodriguez, a junior faculty member with a dual appointment in the Spanish and the Elementary Education Departments, instead of her. New Paltz, however, had many legitimate reasons for terminating de la Cova instead of Rodriguez. Rodriguez was a valuable and unique faculty member. First, Rodriguez held a half-line in each of the Spanish and Elementary Departments. If New Paltz terminated Rodriguez, it would have eliminated only half a line from Spanish and would have had to devise a way to eliminate another half line. Second, Rodriguez was the director and sole faculty member in the Bilingual Education Teacher Training Program in the Elementary Education Department. In this position, he was responsible for applying for and administering approximately $100,000 in grants per year. The Program was also popular, and New Paltz did not want to interfere with it. Third, Rodriguez was one of

three Puerto Rican faculty members at New Paltz. Puerto Rican students relied on him for counsel and assistance. Rodriguez was also a native Spanish speaker, which gave him an advantage over non-native speakers in teaching Spanish courses for native speakers.

2. **Salary**

de la Cova's starting salary was $10,500, and it rose to approximately $13,000 by the time she left New Paltz. Rodriguez' starting salary was $12,500, and it remained higher than de la Cova's throughout the relevant time period. de la Cova claims the reason for the salary difference is sex discrimination. The evidence shows otherwise. First, Rodriguez' field of bilingual education was new, with few qualified applicants. New Paltz hired him only after a long search. Second, Rodriguez bargained for a higher salary, and there is no evidence that de la Cova did. Third, as described above, Rodriguez' varied responsibilities made him more valuable than de la Cova to New Paltz.

3. **Initial rank**

de la Cova's initial rank was instructor, Rodriguez' was assistant professor. She claims this difference is due to sex discrimination. Once again, the evidence demonstrates otherwise. Neither de la Cova nor Rodriguez held a Ph.D. when hired. New Paltz' standard practice at the time was to hire such faculty as instructors. The New Paltz Administration wanted to hire Rodriguez as an instructor, but through the insistence of Lorraine Bagley and the bargaining of Rodriguez, it made an exception for Rodriguez. The reason for the exception is that Rodriguez' field of bilingual education was new, and Rodriguez, holding a Master's degree in Bilingual Education, was as highly qualified as other candidates. (Pl. Exh. 714) New Paltz determined that assistant professor was the appropriate starting position for a person with Rodriguez' qualifications.

4. **Promotion**

de la Cova applied for a promotion in 1977 after she had completed her course work in her Ph.D. program. Her department, its chairperson, and the Central Committee on Promotion and Salary Increase made positive recommendations. New Paltz, however, rejected the application. Its reason for doing so was neutral and not pretextual. The SUNY budget division, having concluded that the New Paltz faculty was "top heavy" in rank, had imposed severe promotion quotas on New Paltz shortly before de la Cova's application. New Paltz opposed this, but to no avail. New Paltz did not promote de la Cova because she was not, without a doctorate, deserving of one of the few opportunities for promotion. de la Cova's complaint is without merit and is dismissed.

D. Carolee Schneeman

Carolee Schneeman is an accomplished artist whom New Paltz hired as a part-time faculty member to teach film-making in the spring of 1977. She taught at New Paltz for a total of three semesters and was terminated after the spring, 1978 semester. She claims that she was the victim of sexual harrassment in the terms, conditions, and privilege of employment in violation of Title VII. See Meritor Savings Bank FSB v. Vinson, 106 S. Ct. 2399, 2406-07 (1986). In order to prove her claim, Schneeman must show that: 1) she belongs to a group protected by Title VII; 2) she was subject to sexual harrassment; 3) it would not have occurred if she were not female; 4) the harrassment affected a term, condition, or privilege of employment; and 5) her employer knew or should have known of the harrassment but failed to take action. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

At trial, Schneeman complained of the following incidents: 1) the film lab had no editing bins and her department refused to provide them; 2) she did not have an office, telephone or secretary while other men in her department did; 3) one of the cameras she used for her

classes broke and the department blamed it on her and asked her to pay for it; 4) a faculty member asked her to sweep up cigarette butts that her students had dropped in the hall; 5) her students had difficulty with access to her classroom at night; and 6) her department chairperson asked her to give a party with artists in the community for a visiting film-maker.

Incidents 1, 3 and 5 are unfortunate, but have no relation to Schneeman's gender. Incident 2, on its face, is related to gender, but the only evidence in the record demonstrates that part-time faculty in the art department did not have offices, and all the male faculty with offices had full-time positions. Incident 4 can be construed as related to gender but is at best an isolated incident. There is no evidence that cleaning the halls was part of Schneeman's duties. Incident 6 is also possibly linked to gender, but the evidence indicates that Schneeman lived in New Paltz, and was thus well suited to invite community artists to a party. Considering all the alleged incidents of harrassment as a whole, there is no showing of sexual harassment. The evidence also indicates that Schneeman did not report any of these incidents to the affirmative action office, the president, or the academic vice-president. Schneeman's claim is without merit and is dismissed.

VII. HARRIET KLAPPER'S CLAIMS

Harriet Klapper alleges that the defendants violated the Equal Pay Act, 29 U.S.C. Sec. 206(d) (the "EPA") as to her. She also claims that the conditions of her employment were such that she was constructively discharged.

Defendants move to dismiss the claim of constructive discharge because Klapper never filed a claim with the EEOC or SDHR. The basis of Klapper's constructive discharge claim is that salary discrimination against her forced her to resign. Since salary discrimination is one of the class claims, defendants' motion is denied.

The defendants also move to dismiss Klapper's EPA claim as barred by the statute of limitations. The applicable statute of limitations, 29 U.S.C. Sec. 255(a), requires that actions under the EPA must be brought within two years, or three years if the violation was willful. The payment of a discriminatory wage is a violation which begins when the wage is set and continues with the receipt of each discriminatory paycheck. Derouin v. Louis Allis Div., 618 F. Supp. 221, 223 (D. Wisc. 1985); Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980). Klapper filed her complaint on February 3, 1982, while she was still employed at New Paltz and receiving a salary from New Paltz. Her claim is thus timely.

A. Equal Pay Act: Elements

The Equal Pay Act prohibits employers from paying higher wages to men than women "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. ..." 29 U.S.C. Sec. 206(d)(1). The plaintiff has the burden of proving that she was paid less than a man doing equal work. See Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Mazzella v. R.C.A. Global Communications, Inc., 642 F. Supp. 1531, 1551 (S.D.N.Y. 1986), aff'd, 814 F.2d 653 (2d Cir. 1987). If the plaintiff establishes a prima facie case, the burden shifts to the employer to show that the wage differential is justified under one of the four statutory exceptions: a merit system, a seniority system, a system which measures quality or quantity of production, or a differential based on any factor other than sex. 29 U.S.C. Sec. 206(d)(1)(i)-(iv). See Corning Glass, 417 U.S. at 196; Mazzella, 642 F. Supp. at 1551. Klapper, who was a faculty member in New Paltz' Department of Economics and Business, claims that she was paid less than two male faculty members in the same department whose jobs were equal to her job: Fred Zeitler and Donald Wilen.

B. Prima facie case

1. Salary levels

The evidence regarding Klapper's, Wilen's, and Zeitler's salaries is confusing and contradictory. The trial testimony, exhibits, and the computerized payroll data sheets (Def. Exh. 67) each demonstrate different salaries. The Court resolved these conflicts and determined the salaries in the following way. First, the Court determined the starting salary of each faculty member. This was relatively easy, as it was always included in New Paltz' offer letters, which were either introduced into evidence or identified and used to remind a witness. Second, as described above, a New Paltz faculty member's salary was made of two components: annual across-the-board increases and discretionary increases. The evidence showed that during the relevant time period all New Paltz faculty members received an annual seven percent cost-of-living salary increase, and that Klapper received two discretionary increases, Wilen received one, and Zeitler received none.[26/] The Court thus calculated each faculty member's salary by adding seven percent increases each year to the starting salary and then adding any discretionary increases.

The annual salaries of Klapper, Zeitler, and Wilen were as follows:

	1978-79	1979-80	1980-81	1981-82	1982-83
Klapper	$16,000	$17,120	$20,308	$23.729**	$25,390
Zeitler		$8,500*	$22,190	$23,743	$25.405
Wilen		$22,000	$24,440	$26,140	$27,669

* for spring semester only; annualized salary is $17,000.

** salary at end of school year.

Klapper's salary was less than Zeitler's in 1980-1981. In 1981-1982, Klapper's salary was $875 less than Zeitler's in the fall semester, and then equalized by her discretionary increase in January. Zeitler's and Klapper's salaries were close enough for the rest of 1982, and in 1982-1983, such that, given the imprecision of the evidence, the Court deems them equal. Klapper's salary

was less than Wilen's in each of the relevant years.

2. Equal work requirements

In order for Klapper to prove that her work was equal to Zeitler's and Wilen's she need only show that the work they all performed was substantially equal. Brock v. Georgia Southwestern College, 765 F.2d 1026, 1032 (11th Cir. 1985); Mazzella, 642 F. Supp. at 1551. It is irrelevant that they all had the same title of assistant professor in the Economics and Business Department. The jobs, not the job titles, must be equal. Id. Finally, the Court is not to compare Klapper's, Zeitler's, and Wilen's qualifications at this stage. Klapper need only show in her prima facie case that the jobs, not the employees, were equal. Georgia Southwestern, 765 F.2d at 1032.

The general job responsibilities of assistant professors at New Paltz were the same: teaching three or four courses each semester, meeting with and advising students, and engaging in other departmental service. The evidence indicates that Klapper, Zeitler, and Wilen all served on various committees. In additon, Klapper also devised and coordinated the accounting program. Klapper taught basic, intermediate, and advanced accounting courses. Wilen taught tax accounting and basic accounting courses. Zeitler taught accounting and finance courses.

Based on this evidence, the Court concludes that Klapper's job was equal to Wilen's and Zeitler's. They each were required to do an equal mix of service, advising, and teaching. All taught basic accounting, and each had a different specialty. See Georgia Southwestern, 765 F.2d at 1033; Hein v. Oregon College of Education, 718 F.2d 910, 918 (9th Cir. 1983).

Klapper has thus established a prima facie case with respect to Wilen for the academic years 1979 through 1982, and as to Zeitler in the academic year 1980 and the fall semester of the 1981 academic year.

C. Defenses to plaintiff's prima facie case

Defendants claim that a merit system and factors other than sex justify the difference in salaries.

1. Merit system

Unequal pay for equal work is justified when the payment is made pursuant to a merit system. 29 U.S.C. Sec. 206(d)(1)(ii). The merit system must be an organized and structure procedure whereby employees are evaluated systematically according to predetermined criteria. The New Paltz merit system does not satisfy these criteria. It is not even a "system", as there is no "systematic" evaluation of employees. Rather, faculty members must nominate themselves for merit increases.

Even if New Paltz did have a merit system, it would not explain the salary differences as Zeitler never received a merit increase. Wilen received one merit increase of $900 in 1980, and his salary would have been higher than Klapper's even without the increase.

Rather than a merit salary system, the differences in the salaries resulted from differing starting salaries, and there is no evidence that a merit system was used to set starting salaries. Even if one were, it is an unsettled question as to whether the merit system exception applies to starting salaries. See EEOC v. Aetna Ins. Co., 616 F.2d 719, 725-26 (4th Cir. 1980); Chang, 606 F. Supp. at 1229.

2. Factors other than sex

A pay differential resulting from market forces is legitimate under the EPA's exception for pay differentials resulting from factors other than sex. Horner v. Mary Institute, 613 F.2d 706, 714 (8th Cir. 1980). The fact that a woman is settling to work for a lower salary than a man because of her inferior bargaining position as a woman is not, however, legitimate. Chang, 606 F. Supp. at 1229.

Peter Vukasin, New Paltz' academic vice-president during the relevant years, testified that salaries for busi-

ness professors rose dramatically the year after Klapper was hired. The Court does not credit this testimony, as it is without support, and it is too convenient and coincidental for New Paltz to assert that salaries rose so dramatically the year after Klapper was hired. Even if the Court did accept Vukasin's testimony, the market rate alone could not explain the wide disparity in the various starting salaries.

Other factors can be considered as legitimate explanations for pay differentials under the EPA. These include: 1) experience and background, EEOC v. First Citizens Bank, 758 F.2d 397, 401 (9th Cir.), cert. denied, 474 U.S. 902 (1985); Mazzella, 642 F. Supp. at 1552; 2) education, Walter v. KFGO Radio, 518 F. Supp. 1309, 1318 (D.N.D. 1981); and 3) inducement to hire the best person for the job, Mazzella, 642 F. Supp. at 1552; Walter, 518 F. Supp. at 1318.

Klapper received her Masters in Business Administration ("MBA"), with a concentration in accounting, in 1974 from Fairleigh Dickinson. She became a Certified Public Accountant ("CPA") in 1976. Prior to coming to New Paltz, she taught part-time at Sullivan and Orange County Community Colleges. She taught one or two beginning and intermediate courses per semester for approximately seven semesters, and held the rank of adjunct instructor and then adjunct associate professor.

Klapper had the following work experience: 1955-1965, part-time bookkeeper for her husband's business; 1965-1967, accounts clerk at Sullivan County Community College; 1967-1970, bursar at Sullivan; 1970-1974, comptroller at Sullivan; 1974-75, accountant with a private accounting firm; and 1975-78, comptroller at Sullivan. While at Sullivan, Klapper also served as administrator of the Student Faculty Administration and the Sullivan County Dormitory Corporation.

On the resume Klapper submitted to New Paltz, Klapper described the comptroller's job as including

preparation of the annual college budget, management of the accounting and reporting system, budgetary and payroll accounting, and student accounting. She described the bursar's job as including supervision of student accounting, collection and disbursement of funds, maintenance of accounting books and records, and financial reporting. Klapper did not list her jobs as administrator of the Student Faculty Administration and the Dormitory Corporation.

Wilen received his MBA from Baruch College in 1958 and a J.D. degree from Brooklyn Law School in 1978. He became a CPA in 1964. His employment record prior to New Paltz was: 1958-1961, private accounting firm; 1961-1968, special investigative auditor and supervisor with the Port Authority; and 1978-1980, partner in a private accounting firm. Wilen had six years of full-time college teaching experience at St. John's University in New York. This included three years as a lecturer in accounting in St. John's two-year division, and three years as an assistant professor of accounting and chairperson of a small department of business at St. John's Staten Island campus.

Joel Bloom, the chairperson of New Paltz' Business and Economics Department the year Wilen applied, testified that Wilen had the qualifications the Department needed to help develop its business program. Bloom was especially impressed with Wilen's law degree. Wilen requested a starting salary of $22,500, New Paltz offered $22,000, and Wilen accepted it. His salary the previous year had been $11,000.

Zeitler obtained his MBA in 1968, concentration in accounting, from SUNY-Albany. He became a CPA in 1971. Zeitler taught basic and intermediate accounting at Siena College for one year. He also taught accounting part-time for a total of three or four semesters at Marist College and Dutchess Community College. Zeitler's other experience included two years as an accountant at

the firm of Price Waterhouse, five years as the chief financial officer at a real estate development company, and five years as the owner of a home building company. New Paltz offered Zeitler a $19,000 starting salary, he negotiated for a higher salary, and received $22,190.

Wilen's experience, background, and education justify a higher starting salary than Klapper. He had six years of full-time college teaching experience, Klapper had none. He had also been the head of a small business department and had a law degree, two credentials which New Paltz felt would be very helpful in building its own business program. Wilen's higher salary reflects both his experience and New Paltz' strong desire to hire him.

Comparing Klapper to Zeitler is more difficult. As far as prior teaching experience, Zeitler had a small edge -- one year full-time and three or four semesters part-time against seven semesters of part-time. On the other hand, Klapper's accounting experience was more extensive and in positions of greater responsibility than Zeitler's. To the Court, Zeitler and Klapper appear to have equal qualifications.

New Paltz presents two other reasons for the differences in pay. First, after Klapper was hired, New Paltz' business program was approved by the state education office, enabling New Paltz to offer higher salaries. This explanation has no weight, as the relation between higher salaries and approval of the business program was not ever explained. Second, New Paltz claims that Klapper was hired during a year in which New Paltz' fiscal crisis was more serious than the year in which Zeitler was hired. There is no credible evidence, however, that the starting salaries were affected by this.

In conclusion, New Paltz has satisfied its burden to prove a legitimate non-discriminatory reason for paying Wilen more than Klapper. New Paltz has not been able to prove such an explanation for Zeitler. Thus, Klapper has proved that New Paltz violated the EPA in the 1980

academic year, and in the fall semester of the 1981 academic year.

D. Damages for Equal Pay Act Violation

The remedies for EPA violations are set forth in 29 U.S.C. Sec. 216(b). Remedies include back pay, liquidated damages equal to the back pay, and attorney's fees and costs.

1. Period of backpay award

Klapper is entitled to damages for only the period in which she suffered pay discrimination. See Jehle v. Heckler, 603 F. Supp. 124, 126-27 (D.D.C. 1985). Klapper has proven pay discrimination only as to the 1980 and part of the 1981 school years. By then, Klapper's and Zeitler's salaries had been equalized.

Klapper is thus entitled to the difference between Zeitler's and her salary in 1980, or $1,882, and the difference in the fall semester of 1981, or $889. This is a total of $2,771.00.

2. Liquidated damages

Liquidated damages are awarded to a successful EPA claimant unless the employer shows that it acted in good faith and had reasonable grounds for believing its acts were in conformity with the EPA. 29 U.S.C. Sec. 260. In order to be excused from liquidated damages, an employer must show both good faith and reasonable belief. Doty v. Elias, 733 F.2d 720, 725-726 (10th Cir. 1984).

In this case, defendants did make a good faith effort to remedy Klapper's pay disparity: Vukasin recommended that she receive a $4,000 pay increase for the 1980-1981 school year, which would have made her salary equal to Zeitler's. Klapper only received $1,990 that year because that was the maximum discretionary increase. She received $2,000 in two parts 1981-1982, equalizing her salary in the spring semester. However, New Paltz did not have reasonable grounds for believing it was in compliance with the EPA. In fact, it had no grounds for believing it was in compliance as there is no evidence in

the record that it made an inquiry. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). The record does reflect that both Bloom and Vukasin believed that Klapper's salary was inequitable, and Vukasin feared this would lead to legal trouble.

In light of this, Klapper is awarded liquidated damages in an amount equal to her back pay award, $2,771.

3. Prejudgment interest

A party cannot recover both liquidated damages and prejudgment interest under the EPA. Doty, 733 F.2d at 726. But see Bonura v. Chase Manhattan Bank, 629 F. Supp. 353, 363-66 (S.D.N.Y.) (liquidated damages and prejudgment interest available in claims under the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621, because purpose of liquidated damages under that statute is punitive), aff'd, 795 F.2d 276 (2d Cir. 1986).

4. Attorney's fees and costs

A successful EPA claimant is entitled to both attorneys fees and costs. Plaintiff's counsel is to file an affidavit in support of a fee request within ten days of the date of this opinion.

E. Constructive Discharge

In order to succeed on her claim of constructive discharge, Klapper must prove that New Paltz deliberately attempted to force her resignation by creating intolerable working conditions. Cruz Lopez v. S.B. Thomas, Inc., No. 86-7920, slip op. at 5729 (S.D.N.Y. October 22, 1987). The working conditions must be so difficult or unpleasant that a reasonable person in the employee's position would feel compelled to resign. Id. The only conditions that Klapper showed in favor of her claim was unequal pay. This is not sufficient, by itself, to prove constructive discharge. Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

VIII. JANUARY 17, 1985 DISCOVERY ORDER

Defendants have asked that this Court's discovery

order of January 17, 1985 be vacated and that costs be awarded. This request is denied at this time without prejudice to defendants making a motion for this relief and allowing the plaintiffs a chance to respond.

IX. CONCLUSION

The plaintiffs' statistical evidence did not prove sex discrimination in salary, rank, and initial placement in rank. The evidence about university practices demonstrated that New Paltz' affirmative action program was suspect, its method for redressing salary inequities was flawed but in good faith, and that New Paltz' decisions about retrenchment, the campus school, and the Women's Studies Program were not discriminatory. The only evidence of discrimination against individuals was salary discrimination against Johanna Sayre and Samantha Joe Mullen. These were only isolated incidents, as in no other case did the Court find any evidence of discrimination in violation of Title VII. None of the individual Title VII claimants succeeded on these claims, and only Harriet Klapper succeeded on her EPA claim.

The Court thus finds for defendants on all claims except Harriet Klapper's EPA claim. The class action and the claims of Ottaviani, Schneeman, Jessup, and de la Cova are dismissed. Judgment is to be entered for Klapper for $5,542.00. A supplemental order will be issued granting Klapper attorneys' fees after her attorney files her affidavit.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 11, 1988

ENDNOTES

1. Faculty at New Paltz are hired into various ranks. The "academic" ranks are professor, associate professor, assistant professor, and instructor. The "qualified" ranks are all other ranks, such as lecturer. Faculty in an academic rank either hold tenure or are eligible for it (and thus on a "tenure track") and those holding qualified rank are not eligible for tenure. Tenure is a contract to teach at New Paltz until retirement.

2. In their post-trial memorandum, plaintiffs assert a claim for discriminatory treatment in salary at hire. Since this claim is beyond the scope of the stipulation, the Court will not consider it.

   Defendants argue that the Court should dismiss the claim of class-wide discrimination in rank at hire as untimely. Defendants' argument is untimely and waived. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

3. Plaintiffs did not introduce the results of a test of the statistical significance of these results during Dr. Gray's direct examination, but attempted to do so in rebuttal. The Court excluded it on two grounds: it was improper rebuttal and Dr. Gray had testified on direct that there was not enough data to do an analysis of the statistical significance of the results of the study.

4. The studies which account for department chairs do not report results for the 1973/74 academic year, while exhibit 885 does.

5. Since the nursing program was established in 1981, comparisons for only the last four years of the liability period are possible.

6. Although Dr. Stoikov presented the results of a standard multiple regression analysis of the influence of the variables, she testified that this tech-

nique was inappropriate since the dependent variable -- rank -- could only assume four variables. The Court thus does not consider those results.

7. The term "hired correctly" means being hired into the predicted rank.

8. The system for distributing discretionary pay increases is described more fully in Section III. B.

9. Dr. Stoikov's study of pre-1973 discrimination was limited only to 1971 and 1972 and is of limited usefulness.

10. Criticisms one and three are contrary to the Court's findings.

11. This includes 1.5 years at New Paltz and 5 years at Pembroke College. It is unclear from the record whether Puretz held academic rank at Pembroke, but it seems unlikely since she did not have a terminal degree when she taught there.

12. The first subcommittee had voted against Puretz, but it had been illegally convened so New Paltz appointed another one.

13. This higher rank is justified by their superior qualifications and is not based on discrimination.

14. Scott was not eligible for more than a oneyear renewal in 1978, as she was to be considered for tenure in 1979.

15. Nahon himself was retrenched in 1979. (Def. Exh. S(5)(3))

16. There is no issue regarding Ottaviani's membership in a class protected by Title VII.

17. There is no claim or evidence that New Paltz denied tenure to Ottaviani in retaliation for her activity on behalf of women's rights.

18. This evidence will be discussed more fully in the Court's discussion of Ottaviani's proof of pretext.

19. These warnings will be discussed in the Court's discussion of discrimination in promotion, infra, at Section V. A. 2.

20. Maulucci testified at trial that only 25 of his post-Master's credits counted toward a Ph.D. Nevertheless, Coffman reasonably believed that all 64 credits counted, and justifiably based his decision on this.

21. Ottaviani did not teach clinical courses when she was considered for tenure. She taught academic courses.

22. The maximum contract renewal Ottaviani could receive in 1972 was one year because she was scheduled to be considered for tenure the next year.

23. Jessup also claims that her salary was lower than other males due to sex discrimination. The evidence shows, however, that as soon as she requested a salary increase, New Paltz granted Jessup a raise of $1,125, which, she testified, satisfied any salary inequity. Thus, even if her salary was lower than comparably placed males, New Paltz quickly remedied the discrepancy, and there is no evidence that Jessup suffered any harm.

24. Vukasin is an economist and as a social scientist is qualified to comment on the quality of Jessup's article.

25. This decision and the ultimate non-renewals are discussed in the section about Samantha Joe Mullen.

26. Klapper received the following discretionary increases: December of 1980, $1,990 retroactive to the beginning of the year; and $2,000 on December 21, 1981, of which $1,125 would be retroactive to the beginning of the school year, and $875 would begin in January, 1982. Wilen received a $900 discretionary increase in 1980-81.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

SDNY
77CV6249
Kram

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the ninth day of May, one thousand nine hundred and eighty-nine

Present:
Hon. Ellsworth A. Van Graafeiland
Hon. Richard J. Cardamone
Hon. Lawrence W. Pierce
Circuit Judges,

ROBERTA OTTAVIANI, Individually and on Behalf of all other persons similarly situated,

Plaintiff-Appellant,

CAROLEE SCHNEEMANN, JOAN MARIE de la COVA, DOROTHY JESSUP, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Intervenor-Appellants,

—v.—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR., in his capacity as Chancellor of the State University of New York,

Defendants-Appellees,

HARRIET KLAPPER,

Plaintiff-Intervenor-Appellee,

—v.—

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, CLIFTON R. WHARTON, JR., ALICE CHANDLER, PETER VUKASIN, and THE TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK,

Defendants-Appellants.

BEST AVAILABLE COPY

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is afirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro
Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
No.89A-181
Roberto Ottaviani, etc., et al.
Applicants
v.
State University of New York at New Paltz, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s).
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case is hereby, extended to and including October 12, 1989.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of September, 1989

APPENDIX E

42 U.S.C. §2000e-2.

Unlawful employment practices.

Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national orgin;

APPENDIX F

Standard Deviation Range	Corresponding Probability Range	Exhibits 888	889	890
0-1	1/1 to 1/3.15 (1 chance in 1 to 1 chance in 3.15	1	0	1
1-2	1/3.15 to 1/22 (1 chance in 3.15 to 1 chance in 22)	2	2	3
2-3	1/22 to 1/384 (1 chance in 22 to 1 chance in 384)	3	3	2
3-4	1/384 to 1/15,786 (1 chance in 384 to 1 chance in 15,786)	2	2	3
4-5	1/15,786 to 1/1,742,160 (1 chance in 15,786 to 1 chance in 1,742,160)	3	3	2
5-6	1/1,742,160 to 1/506,792,296 (1 chance in 1,742,160 to 1 chance in 506,792,296)	0	1	0
6+	Less than 1 chance in 506,792,296)	0	0	0

(Source for the corresponding probability ranges of the table above is Milton Abramowitz & Irene Steigan, Handbook of Mathematical Functions, National Bureau of Standards, U.S. Government Printing Office, Applied Mathematics Series No. 55. adopted by Second Circuit with one error, see App. __)

APPENDIX G

Academic year	888	889	890
1974-1975	-2.92	-2.98	-2.98
1975-1976	-3.35	-3.21	-3.40
1976-1977	-4.07	-4.06	-4.07
1977-1978	-4.12	-4.22	-4.04
1978-1979	-1.58	-1.97	-1.63
1979-1980	-1.71	-2.00	-1.61
1980-1981	-2.14	-2.81	-1.97
1981-1982	-2.76	-3.23	-2.61
1982-1983	-4.09	-5.08	-3.08
1983-1984	-3.32	-4.20	-3.30
1984-1985	- .97	-1.42	-.92

Supreme Court, U.S.
FILED
DEC 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE DE LA COVA, DOROTHY JESSUP, Individually and on Behalf of all Other Persons Similarly Situated,

Petitioners,

– against –

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 341-2603

O. PETER SHERWOOD
Solicitor General

JUDITH T. KRAMER
Assistant Attorney General
[Counsel of Record]

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STATUTE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ..... *passim*

No. 89-612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE DE LA COVA, DOROTHY JESSUP, Individually and on Behalf of all Other Persons Similarly Situated,

Petitioners,

– against –

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

Petitioners Roberta Ottaviani, Carolee Schneemann, Joan Marie de la Cova and Dorothy Jessup individually and on behalf of a class (hereinafter "petitioners") seek review of the judgment and decision of the United States Court of Appeals for the Second Circuit, dated May 9, 1989, unanimously affirming the decision of the United States District Court for the Southern District of New York, dated January 11, 1988, which dismissed all of petitioners' claims of sex discrimination in employment brought against the State University of New York ("SUNY") at New Paltz ("New Paltz") and Clifton R. Wharton, Jr. ("respondents") pursuant to 42 U.S.C. 2000(e) *et seq.* ("Title VII"). (A2-A27) Specifically, the Court of Appeals affirmed the

District Court's determination that petitioners had failed to show, either on a classwide or on an individual basis, that women faculty in the Division of Liberal Arts and Sciences at New Paltz (the "Division") were treated differently on account of their sex with regard to initial placement into rank, current rank and salary. Based upon its review of the record, the Court found, that the District Court's rejection of petitioners' statistical and anecdotal evidence was not clearly erroneous. The Court also held that, with regard to their classwide claims, "the burden of persuasion was on the petitioners to prove by a preponderance of the evidence that there was a pattern or practice of discrimination at SUNY, New Paltz, and they failed to meet that burden." (A.27) The Court's finding in this regard applied not only to the eleven year post-Act period in issue but also to the period of time prior to the effective date of Title VII.

Because the holding of the Court below is narrowly confined to the facts presented at trial and because the Court's opinion presents no conflict with decisions of this Court or with other Circuits, this Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. *Background*

New Paltz, one of 29 SUNY campuses, was a campus in financial crisis during the entire class period. Indeed, by the late 1970's, there was concern that the college would be closed. (SA 418, 419) Student enrollment began to drop in 1971-72. From 1975-76 to 1985-86, enrollment declined 19% as compared with a 6% decline for the University as a whole. These declines had a direct negative effect on New Paltz's operating budget.

The Governor directed New Paltz administrators to achieve fiscal saving by not filling faculty lines as they became open; filling lines slowly; and filling lines at lower than usual salaries. (SA 328, 344) In 1975, eleven lines were eliminated. In 1978, six more were cut. (SA 422, 423) Between 1975 and 1985 New Paltz lost 42 faculty lines. (SE 105)

In addition, New Paltz was forced to retrench faculty. (SE 426) In 1976, six males and two females were retrenched. (SA 421) In 1979, 21 faculty members, 19 of whom were male, were retrenched due to further program cuts. (SE 426) No females in the Division were retrenched. (SE 426)

The budget crisis also had a significant impact on faculty promotions. Beginning in 1974, pressure was exerted on New Paltz by the Governor and SUNY to limit the number of promotions made. (SA 454; SE 62) From 1978-1980, the New York State Division of the Budget continued that pressure by imposing a "faculty rank adjustment" which deleted $200,000 from New Paltz's budget. (SA 329-32) Nevertheless, during that time, women at New Paltz were promoted as quickly as the men. (E 493-94) Moreover, between 1980-84, women were promoted to the rank of associate professor at a higher rate than men (SA 745) and several women were promoted to the rank of professor. (SA 750)

Notwithstanding the financial crisis, New Paltz was committed to equal employment opportunity ("EEO") and pursued its affirmative action goals throughout the class period. The Affirmative Action Officer ("AAO"), initially hired in 1971 (SA 301, SE 108, 111), participated in all decisions regarding hiring, tenure, renewal and promotion. (SA 427, 357, 361, 368, 398) Under the direction of the AAO, EEO reports were maintained and statistics were monitored. (SA 358-60) These reports showed that, overall, women fared as well as men in the face of the budget crisis. For example, a summary of renewal decisions made between December 15, 1973 and June 15, 1979 showed that 87% of the women and 87% of the men were renewed. (SE 407) From 1980-84, all women considered for contract renewal were renewed. (SE 139) Moreover, even in years when there were many terminations, the numbers showed that the campus maintained a favorable replacement pattern for women. (SA 254-55; SE 427) The percentage of females at New Paltz increased slightly, from 21% in 1975 to 23% in 1979. (SE 53) Between 1980 and 1986 the number of female administrators increased from 13 to 31. (SA 727-30; SE 1, 2) Between 1981-86, 42% of all full-time hires were females. (SE 224)

In addition, between 1973-79, 75% of the women reviewed for tenure were granted tenure, while only a slightly higher percentage – 77% – of the men were granted tenure. (SE 139, 405) Tenure was granted to two-thirds of the women faculty who were considered between 1980-84, but to only 55% of the men. (SA 744)

From 1973 through 1980, the AAO also conducted annual salary reviews to identify salary inequities[1] (SE 51, 474, 478, 489, 495, 499, 554) and made adjustments where appropriate. (A 61) In contrast to other campuses, New Paltz was singularly concerned with pay equity. (SA 431)

B. *Proceedings Below*

On December 27, 1977 Roberta Ottaviani, who was a full-time faculty member of the Division at New Paltz from 1967 to 1974, filed the complaint in this case. Petitioner Ottaviani ("petitioner") claimed that New Paltz had discriminated against her on the basis of sex in regard to the terms and conditions of her employment, including hiring, promotion, tenure and salary. On April 27, 1979, a motion to intervene additional plaintiffs was granted.

A class was certified on May 19, 1978. By stipulation, it was redefined as all full-time academic rank female faculty members employed in the Division at New Paltz at any time during the period starting in the Spring of academic year 1973-74 through the Fall of academic year 1984-85. Class claims were limited to placement into initial rank, current rank and salary. (SA 1-5)

---

[1] "Inequity" in the salary review context within SUNY does not refer to "discrimination" on account of sex, but refers to all persons who receive unequal salaries. Salary differences may be based on legitimate factors such as difference in rank, number of years of service, and highest degree attained, as well as some less quantitative variables such as publications, community service, professional service, teaching effectiveness and unique conditions within particular departments. (SA 293-94)

1. *The Trial*

Trial commenced on June 10, 1986. The sole question presented was whether New Paltz treated females differently from their male counterparts. (A. 18, 19) On April 8, 1987, after petitioners' rebuttal case, the trial record was closed by the District Court. (SA 771-72)

a. *The Statistical Evidence*

Petitioners presented a number of statistical studies in support of their salary claim. Their main salary studies consisted of multiple regression analyses for all faculty employed from 1973 to 1984 which purported to show that females in the Division at New Paltz received lower salaries than comparable males. Respondents showed, however, that petitioners' statistical methods were deficient in important respects. Petitioners' use of a males-only regression not only resulted in an overestimate of gender-based differences in salary (A 48), but also resulted in inappropriate comparisons between women and men with different characteristics. (SA 709) For example, in the natural sciences, the average male is an associate or full professor, and a males-only regression predicts a female instructor or assistant professor's salary on the basis of those in senior ranks. (SA 709-10) Moreover, male counterparts were unavailable in some Departments, notably the highly paid all-female nursing faculty, who were omitted from petitioners' main studies. (SA 703, 711-12)

In addition, petitioners' exhibits including a rank variable, inappropriately aggregated instructors and assistant professors into a single rank. (SA 266-72, 755-57) This had the effect of predicting instructors' salaries on the basis of the salaries of assistant professors, and showing a spuriously large deficit from the predicted salary in the case of women instructors. When petitioners finally produced studies where rank was more appropriately specified, salary disparities fell below 2.33 standard deviations in eight out of eleven years. (SE 688, 701) Finally, the set of variables considered by petitioners in all of their salary regressions was shown to be incomplete and incorrect.

Respondents not only demonstrated why petitioners' statistics were deficient, but also introduced their own studies for faculty

employed in the Division between 1973 and 1984. (E 425, 501-02 and supporting appendices in Ex. S6-A) In contrast to petitioners' studies, respondents' studies show *no* year in which the disparity between male and female salaries equals or exceeds two standard deviations. Respondents' studies also demonstrate that the differences between women's observed and regression-predicted salaries are randomly distributed. (SE 342)

Respondents' expert also separately studied initial salaries and salary increases during the class liability period. (E 495-500, 503) These studies showed that the difference between male and female starting salaries is not statistically significant and that, females' salaries increased faster than males'.

In addition respondents separately analyzed salaries for 1971 and 1972. The analysis of salaries of persons hired before 1972 showed no statistically significant differences between male and female salaries in those years. (E 507) Although this Court rendered its decision in *Bazemore v. Friday*, 478 U.S. 385, (1986) before petitioners presented their case-in-chief, petitioners did not separately study gender-based differences in salary for the group of persons hired before 1972 when Title VII became applicable to SUNY.

The experts disagreed as to whether academic rank could be used in this case as a legitimate independent variable accounting for male/female salary differences.[2] Petitioners asserted that rank is "tainted", but did not introduce any statistically validated evidence in support of this assumption. (SA 639-40, 644) Petitioners' exhibits purporting to show that rank is tainted (SE 639; E 261, 285, 372, 397, 373, 423) are, essentially, either lists and cross-tabulations of certain categories of faculty without valid statistical tests (SA 764; E 435), or salary studies which do not measure the statistical significance of gender differences in rank distribution at all. (E 397, 423) For example, petitioners' "proof" that current rank is tainted consisted of nothing more than salary studies showing only that male/female differences in salary are

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[2] As the Second Circuit noted, although petitioners challenge respondents' use of the rank variable, their own expert explained that rank could be used as a measure if it is not tainted. (A 23)

in large part attributable to the differences in male/female distributions in rank. They do not show, however, that such differences in rank distribution are statistically significant, or that they are discriminatory. (SA 755-57, 770)

Petitioners' only other exhibit in this regard concerned promotion. (E 285) This exhibit similarly failed to incorporate relevant information and, therefore, was non-probative as to rank. Thus, it includes all faculty, whether hired pre- or post-1973, identifies the number of faculty members promoted during the years 1973-84 by gender and rank, and shows the average number of years to promotion (of those promoted) by gender and rank. However, the exhibit does not reflect the qualifications of those promoted and not promoted, and provides no statistical analysis of differences in male and female rates of promotion. (E 436)

In addition to showing the deficiencies in petitioners' presentation concerning rank, respondents' expert presented independent evidence that when male/female differences in qualifications are considered, gender is not a significant influence on placement into rank or on promotion. (E 440-49, 488-94; SA 637-701)[3] For example, respondents showed that male and female faculty members possessed significantly different qualifications at hire. (E 488) The average female hired during 1973-84 was less likely to have a Ph.D. or a publication at time of hire; had fewer years, on average, of prior college teaching, related research and other related experience; and was less likely to have held a prior academic teaching rank or one higher than an entry level rank than the average male hired during the same time period. (SA 658-59) Given these differences in qualifications, it is expected that, in the absence of any disparate treatment, the initial rank of the average female hired would have been lower than that of the average male hired. (SA 659)

There was no showing by petitioners that there were statistically significant differences in the distribution of female/male in current rank, much less a showing that such distribution is attributable to discrimination at New Paltz. Nevertheless,

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[3] For a large number of the 26 class members hired prior to 1973, defendants also presented anecdotal evidence as to the appropriateness of their initial rank.

respondents examined rank in three ways: (1) female/male differences in assignment to initial rank (SE 342, Tables 1-7); (2) female/male differences in probability of being promoted (SE 342, Table 10); and (3) female/male differences in waiting time before promotion. (SE 342, Table 9) Respondents showed that a woman's likelihood of being promoted and average waiting time to be promoted is not significantly different than a man's. (E 493-94) By addressing initial rank, likelihood of promotion and time to promotion, respondents' presentation completely rebutted petitioners' allegations that rank is tainted and showed convincingly that rank at New Paltz is gender neutral. (SA 673-74)

b. *Anecdotal Evidence*

Petitioners' anecdotal evidence with regard to pre-1973 hires consisted solely of a report prepared by the Committee on the Status of Women ("CSW") in 1974 at the request of the President,[4] and testimony from four members of the class, including petitioner Ottaviani, two non-class faculty members, and one librarian.[5] The class witnesses represented only three of the more than twenty departments in the Division, *i.e*, foreign languages, sociology and speech. Petitioners produced no evidence to support their contention that women hired before 1972 were assigned to rank in a discriminatory fashion.[6]

Respondents' anecdotal evidence included summaries of more than twenty personnel files which reveal that, in the 1960's, women were treated the same as or more favorably than men.

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[4] The CSW report was initiated by the President to investigate pay equity. (SE 473) However, it was of poor quality and conceded, by its author, to be unreliable. (SA 300)

[5] Petitioners offered and the Court accepted anecdotal evidence about librarians, although librarians are not teaching faculty at SUNY. However, complaints about librarians' salaries focused on the comparison between librarian and non-librarian salaries, and not upon any male/female comparisons. (SA 88-90, 91-92, 93, 94-96, 248, 249; SE 138)

[6] Petitioners state that "there were separate tenure tracks for men and women." Pet., page 5. However, there is no evidence of this in the record. The citation to the transcript relied upon by petitioners reveals only that in 1969, a female non-class member who is a teacher of dance, was not appointed as track and field coach or as athletic director. (T. 300, 301)

For example, between 1966-70, a man with a Ph.D. and more than ten years of full-time prior teaching experience was hired in the English Department into the same rank as women without their Ph.D., with only two years of experience and no publications. (SE 113) Moreover, while three women were hired in English prior to 1972 with very recent Master's ("M.A.") degrees, no teaching experience, and no publications, there were no men hired in English with so few credentials. (SE 113) The evidence further showed that both males and females, were quickly promoted to the rank of assistant professor before completion of their Ph.D., including petitioner Ottaviani and several other class members hired before 1972.

Petitioners' anecdotal evidence with regard to persons hired in the post-1973 period similarly consisted of isolated and sporadic instances of alleged discrimination. In addition to named petitioners Dorothy Jessup, Joan de la Cova and Carolee Schneeman (discussed *infra* at pp. 9-13), the only other testimony petitioners presented in this regard was that of three other women hired after 1973, two of whom were members of the class. Respondents produced direct evidence which countered petitioners' allegations and showed that in each case the administration had a legitimate reason for the challenged decisions.

Finally, petitioners sought to show that the administration was indifferent to women's issues, as evidenced by its alleged failure to give proper treatment or recognition to women's studies. Respondents demonstrated, however, that the College's administrators have consistently shown a high level of commitment to the program. (SE 225) In fact, New Paltz is one of very few institutions to offer an undergraduate major and minor in Women's Studies and to provide an opportunity for a graduate degree with an emphasis in Women's Studies. (SA 281-82) The program at New Paltz was the first in the SUNY system to offer a Bachelor's Degree. (SA 280)

c. *Individual Claims*

(i) *Roberta Ottaviani*

Roberta Ottaviani was hired in September, 1967 as an instructor in the Speech Department at a salary of $8,000 per year.

This salary, which was based on Ottaviani's M.A. degree and prior non-college teaching experience, was, in fact, higher than Ottaviani would have accepted. (E 149)[7] In June 1968, she was promoted to the rank of assistant professor.

In 1971, 1972 and 1973, Ms. Ottaviani was considered for and denied promotion to the rank of associate professor. She was not recommended by her Chair or by the Central Committee for promotion (SA 305), and each review indicated that Ms. Ottaviani had demonstrated no progress towards the completion of her Ph.D..[8] (SE 257, 258, 259)

A March 23, 1972 memorandum from the Chair of the Speech Department, to the Vice President for Academic Affairs, which recommended that Ms. Ottaviani not be promoted (E 424), states:

> I understand from our department subcommittee that Mrs. Ottaviani bases her case for promotion primarily upon her work in the caucus on women's rights which she interprets as falling under the trustee's criteria of university service. I can attest to the fact that Mrs. Ottaviani has worked hard and long in her support for the movement for equal opportunities for women and that her efforts in this direction have received university-wide recognition. I am concerned that during the more than 4 1/2 years Mrs. Ottaviani has been a member of the faculty, we have no tangible evidence of advanced academic study beyond the Master's degree ...

In 1973, Ms. Ottaviani was denied promotion again because she had "failed to produce concrete evidence that her potential

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[7] There were no males hired in Speech in 1967. In 1966, a male who had completed an M.A. degree, and had taught for one year was hired into the same rank as Ms. Ottaviani at a salary of approximately $7,600. (SA 602; SE 271)

[8] Ms. Ottaviani has never received a Ph.D.. (SA 25)

would be fulfilled." (SA 307; SE 532, 259, 257) She was also considered for and denied tenure in 1973 under the criteria set forth in the SUNY Policies of the Board of Trustees. (SE 227) The Central Committee recommended non-reappointment for Ms. Ottaviani because "her dossier indicated limited professional growth and that the actual progress in the last six years on the doctorate did not suggest any firm commitment to it". (SA 308; SE 529) The President's determination was consistent with the recommendation of the Central Committee and relied, *inter alia*, on Ottaviani's failure to make significant progress toward a Ph.D. and her failure to even formally enroll in a program leading to the degree. (SE 408)[9] The eight other females considered for tenure at New Paltz in 1973 received it. (SE 139)

(ii) *Joan de la Cova*

Ms. de la Cova was employed in 1973 as an instructor in the Spanish Department. (SA 136) In Spring 1978, she was informed that, for budgetary reasons, her contract would not be renewed. She filed an AAO grievance in which she compared herself to a male in the Department who was retained, although he had one less year of seniority. Her complaint was reviewed by the AAO and a report was issued which concluded that the non-renewal was not based upon sex. (SE 542)

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[9] A male was tenured in 1970, although he had not completed the Ph.D.. However, he had offers from two other universities, had recently completed a one year fellowship at New York University and had taken additional graduate credits. By 1970, he had completed 57 credits towards his doctorate. (SA 468-71; SE 55)

Another male was granted tenure in 1975, who had been pursuing his doctorate at Penn State University for three years and was planning to spend the following year in residence at Penn State to complete his degree (SA 474-77; SE 3). His file showed that "since he received the masters he had earned a total of 64 graduate credits, and has embarked on a formal doctoral program at Penn State. He recently completed a qualifying examination under supervision". (SA 477; SE 3, 11) Both of his respective departments gave him positive, strong recommendations for tenure citing his progress toward his Ph.D..

Ms. de la Cova was not comparable to the male (SA 425, 540), and she conceded as much in a letter she wrote to the Central Committee on Tenure and Reappointment. (SE 401) There she notes his special abilities and significant contribution to New Paltz. In addition to coordination of the bilingual program, he obtained several grants for New Paltz each year totalling nearly $500,000. (SA 222-23) Ms. de la Cova could not serve as a substitute for him in the bilingual education program because she had no experience in that area. (SA 245-47)

(iii) *Dorothy Jessup*

Dorothy Jessup was hired by New Paltz in 1973 as an assistant professor in Sociology. (SA 27-28; Exh. 976) She had received her Ph.D. and had two years of full-time college teaching experience, but no significant publications. (Exh. 976) At the time she was interviewed, she was told that she would be expected to publish. (SA 30)

By 1976, she had published only one book review. (SA 39, 40) An article submitted to the *American Journal of Sociology*, was rejected. (SA 47) On December 23, 1976, Dr. Jessup was advised by the *Journal of Sociology of Education* that the same article required a "major overhaul". (SA 41, SE 300) As of May 4, 1977, Dr. Jessup was advised that the article's emphasis should be changed by some "substantial reorganization". (SA 42, SE 233) When Dr. Jessup was considered for tenure in the Spring of 1977 (SA 33), there was no indication in her tenure file that this article would ever be accepted for publication. (SA 43)

Dr. Jessup was denied tenure on August 1, 1977. (SA 37)[10] because of her meager scholarly activity during the preceding

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[10] That same year, a male was denied tenure for the same reasons. Both he and Jessup subsequently received tenure in 1979. (SE 527)

Although a male in Sociology was granted tenure in 1977, he had significant publications and had received a grant. (SA 536, SA 44) Also, by Spring 1977, he had presented a third major article that had been accepted for publication and had received a fellowship. (SA 44)

years and because reports on her teaching were mixed. (SE 466) Moreover, a significant proportion of the Sociology Department did not recommend her. (SA 38)

(iv) *Carolee Schneemann*

Carolee Schneemann, non-class member, taught an introductory course in filmmaking, part-time, for three semesters in the Art Studio Department starting in the Spring of 1977. (SA 188-89) Each of her appointments was for one semester only. (SA 190; SE 557) Her appointment letters, which she signed in each case, clearly stated that, as a temporary employee, her position could be terminated at any time under the Policies of the Board of Trustees. (SA 205; SE 557) After the Spring semester of 1978, she received no further appointment. (SE 553)

There was no evidence presented that her termination was based upon gender. In fact, it was shown that during the next seven years the course was taught by a woman. (SA 203)

2. *The Decisions Below*

On January 11, 1988, the District Court dismissed the complaint as to all of the class and individual Title VII claims. The District Court concluded that petitioners' evidence, taken as a whole, failed to prove sex discrimination in salary, rank and initial placement into rank.

On May 9, 1989, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court in all respects (A2-27). The Court found that petitioners had failed to show that there was a pattern and practice of discrimination at New Paltz and that all of petitioners' arguments were without merit. Thus, in accordance with this Court's decisions, the Court below rejected petitioners' contention that a showing of two or three standard deviations should automatically be equated with a *prima facie* case. Moreover, the Court found that, in this case, it is irrelevant whether petitioners' statistics alone established a *prima facie* case since they had an opportunity to fully litigate all of their claims on the merits.

The Court further rejected petitioners' claim that they had shown that rank was discriminatory at New Paltz. The Court held that "plaintiff failed to adduce any significant statistical evidence of discrimination as to rank" and found that "the respondents, on the other hand, offered persuasive objective evidence to demonstrate that there was no discrimination in either placement into initial rank or promotion at New Paltz between 1973 and 1984." (A.23)

The Court also concluded that petitioners' attempt to establish a claim under *Bazemore v. Friday*, 478 U.S. 385 (1985) was unfounded in this case because they failed to introduce any statistical evidence of substance to prove that New Paltz had engaged in sex discrimination prior to the effective date of Title VII. Finally, the Court concluded that this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. ____, 104 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), did not apply to any of petitioners' claims. The Court, which was familiar with the record in this case, found no evidence of "mixed motives" for any of their claims.

Reasons For Denying The Writ

A. *The Decision Of The Court Below Is Not In Conflict With* Price Waterhouse v. Hopkins.

Petitioners claim that this case should be remanded for consideration of their claims under the standard set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989) i.e., would the decisions in issue have been the same if petitioners were male. Indeed, they seek to apply it to all of their claims, including those of the class. However, as the Second Circuit expressly stated, "[t]he Supreme Court's recent decision in *Price Waterhouse v. Hopkins*, [citation omitted], does not affect our analysis of these petitioners' claims." (A-12, 13 n.5) Thus, contrary to petitioners' suggestion, this is not a case in which the Court below ignored or failed to follow an opinion of this Court. Moreover, petitioners' argument betrays a misunderstanding of the issue addressed in *Price Waterhouse*.

In *Price Waterhouse*, a majority of this Court held that if an employee shows that an adverse employment decision was the result of "mixed motives" and that the discriminatory motive was a substantial motivation for the employer's action, then and only then does the burden of persuasion shift to the employer to prove by a preponderance of the evidence that the same decision would have been made in the absence of any discriminatory motive. 490 U.S. at ____, 109 S. Ct. at 1788. The decision in *Price Waterhouse* was not intended to overrule or modify the existing legal standard, previously expressed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). 490 U.S. at ____, 109 S. Ct. at 1788, 1796. Instead, it was intended to supplement the Title VII analysis in limited cases where a disparate treatment plaintiff produces direct evidence that an illegitimate criterion was a substantial factor in the decision. (O'Connor, J., 490 U.S. ____, 109 S. Ct. at 1796). Moreover, contrary to petitioners' assumption, it has no application to classwide Title VII claims.[11]

This Court carefully noted, as well, that "stray remarks" or a mere isolated or ambiguous comment by a supervisor would be insufficient to shift the burden of proof to the employer (O'Connor, J., 490 U.S. at ____, 109 S. Ct. at 1804). Rather, it is the plaintiff's burden to show in the first instance that the employer actually relied on gender in making its decision. (Brennan, J., plurality opinion; 490 U.S. at ____, 109 S. Ct. at 1804.)

Petitioners in this case have failed to show that they meet the burden imposed by *Price Waterhouse*, and the Court below correctly so held. They did not produce any direct evidence that there were "mixed motives" involved in any of the decisions affecting the class or any individual at New Paltz, much less that any classwide or individual employment action was substantially motivated by gender. The proof offered in support of the

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[11] If petitioners had established their class claims that sex discrimination was pervasive at New Paltz, as they contend they did at p. 17 of the Petition, there would have been no reason for the Court below to rely on *Price Waterhouse* since petitioners would have prevailed under a *Burdine* analysis.

classwide claims consisted only of petitioners' flawed statistical presentation, found to be insufficient to establish a *prima facie* case even under *Burdine* standards, and their anecdotal evidence. Their anecdotal evidence consisted of nothing more than isolated examples of alleged discriminatory employment decisions, most of which did not even concern class members.

Significantly, petitioners cite only two isolated instances which they claim are examples of "mixed motives" decisions. Neither is supported by the record. Moreover, in contrast to the record in *Price Waterhouse*, respondents demonstrated in this case that the decision in both instances would have been the same if the petitioners were male.

For example, petitioner Ottaviani's reliance upon a "stray remark" by a co-worker that she was "cute," made at the time of her hire in 1967, is too tenuous to rely upon as proof that gender played a role in the decision to deny her tenure six years later. Moreover, the record firmly supports the conclusion that respondents would have denied her tenure even if she had not been a female. The District Court found that in 1973 Ottaviani's record of scholarship, growth and mastery of subject matter was weak, that she had only 8 credits towards a Ph.D., that she participated in very few professional seminars, and that in 1973, a male member of the Speech Department was also denied tenure for failing to make sufficient progress towards his Ph.D.. (A. 94)

Similarly, petitioner Jessup's reliance upon a single statement, taken out of context, that "departmental balance would allow for one such woman devoted to students, but not two" is equally tenuous. It does not prove that gender was a substantial motivating factor in the decision to deny her tenure, especially where it was undisputed that she lacked publications, and she received mixed teaching reviews.[12] Moreover, since New Paltz also

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[12] In fact, the record reveals that the operative word was "devoted", not "woman". It states ". . . a department could stand one person who may be weak in terms of substance, but is very devoted to students, but if you have a lot of members of the department that way, you are going to have a weak department." (T. 4893)

denied tenure to a male that same year, for the same reasons, the record shows that the decision would have been the same even if she were a male.

No other evidence of this type was offered on behalf of any of the other individual petitioners or class members. Consequently, the Second Circuit correctly concluded that the decision in *Price Waterhouse* did not affect this case, and no further review is warranted.

B. *The Second Circuit's Treatment Of The Statistical Evidence Was In Accord With The Decisions Of This Court And Was Not In Conflict With Decisions Of Other Circuits.*

Petitioners accuse the Court below of misunderstanding the statistical proof (p. 19), and belatedly attempt to come within the rule of *Watson v. Fort Worth Bank and Trust*, 487 U.S. ____, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988). There is no merit to either argument.

First, petitioners contend that the Second Circuit erroneously concluded that the issue of whether petitioners' statistics alone constituted a *prima facie* case became irrelevant once the District Court required respondents to introduce their proof. In fact, the Court's conclusion in this regard is in accord with this Court's decisions and not in conflict with decisions of other Circuits. As this Court explained in *Bazemore*:

> if the respondents . . . have responded to the petitioners' *proof* by offering evidence of their own, the factfinder then must decide whether the petitioners have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the *only issue to be decided at that point* is whether the petitioners have actually proved discrimination.

478 U.S. at 398 (emphasis supplied, citations omitted); *see also EEOC v. Sears*, 839 F.2d 302, 309 (7th Cir., 1988), ("the fact

that the plaintiff proved a *prima face* case is of no continuing consequence" once a defendant responds to plaintiff's proof); *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 461 (9th Cir.), *cert. denied*, 108 S. Ct. 158, *reh. denied*, 108 S. Ct. 473 (1987) (". . . the only relevant burden in a class action disparate treatment case, assuming petitioners can avoid Rule 41 dismissal, is upon petitioners to prove the existence of discriminatory intent."); *Vuyanich v. Republic Nat. Bank of Dallas*, 521 F. Supp. 656, 661 (N.D. Tex. 1981, *vacated on other grounds*, 723 F.2d 1195 (5th Cir.), *reh. denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984) ("In a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence – to highlight the issues in contest – is about as relevant as a minuet is to a thermonuclear battle.")

Second, petitioners criticize the Second Circuit's affirmance of the District Court's finding that differences of "one to three standard deviations" in this case did not establish a *prima facie* case. Such criticism is unfounded, however, since the Court's conclusion is in accord with well established law. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) ("[w]here *gross* statistical disparities can be shown, they alone *may* in a *proper* case constitute *prima facie* proof of a pattern or practice of discrimination."); *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); *Teamsters v. United States, supra*, 431 U.S. 324, 340 n.20; *Coser v. Moore*, 587 F. Supp. 572, 576-77 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). *See also EEOC v. Sears*, 839 F.2d at 309 (7th Cir. 1988) (affirming a finding by the district court that there was no discrimination even where there was a difference of more than three standard deviations); *Chang v. University of Rhode Island*, 606 F. Supp. 1161. 1189 (D.R.I. 1985) ("even a finding of two or more standard deviations does not prove the existence of discrimination"); *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987).

Thus, the Court below, while noting that, in appropriate cases, statistics alone may be sufficient to prove a *prima facie* case if they show gross disparities (A. 22), concluded after

careful consideration, that petitioners' statistics failed to meet this standard.[13] Its conclusion is supported by this Court's statement in *Watson*, "that there simply is no minimum threshold level of statistical significance which mandates a finding that Title VII petitioners have made out a *prima facie* case." (A. 18)

Petitioners further argue that this Court should review this case so that they can benefit from the recent decision in *Watson*. Pet. page 29. Petitioners concede, however, that this "case was tried and argued on the theory that it was a disparate treatment case." Pet. page 27. In fact, they chose to proceed on that theory alone even though they were fully aware of the availability of the disparate impact theory and even though this Court had decided *Watson* well before this case was fully briefed and argued before the Second Circuit. Having chosen to proceed on a disparate treatment theory alone, petitioners should not now be permitted to raise what amounts not only to a new legal argument, but a new theory of liability never raised by them in either court below. *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Assuming *arguendo* that petitioners may belatedly assert a disparate impact theory, the result would not be different. In *Watson*, this Court stated that a defendant should not be held liable for unintentional discrimination on the basis of less

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[13] Similarly erroneous is petitioners' contention that the Second Circuit "has set up a new and novel standard for discrimination in class action cases" when it noted that the number of standard deviations shown in plaintiffs' expert's "most persuasive" studies were "not significant in every year of the liability period". Pet. page 21. Just as the court did not adopt a hard and fast rule that two or three standard deviations establish a *prima facie* case, the Second Circuit did not establish a rule that statistically significant disparities *must* be shown in every year. Rather, the court's statement that such disparities were not shown in every year was merely an observation of one more defect in a statistical presentation that was severely flawed in a number of other respects. Petitioners' reliance on *Bazemore* is inapposite. In that case, there was overwhelming evidence of pre-Act discrimination which gave credibility to the three years of post-Act statistics showing statistically significant disparities. 478 U.S. at 401.

evidence than is required to prove intentional discrimination. 487 U.S. at ____, 108 S. Ct. at 2785. Therefore, the District Court's finding in this case that petitioners' statistics alone are not sufficient to establish a *prima facie* case under a disparate treatment theory, *a fortiori* precludes a finding that the statistical evidence was sufficient to establish a *prima facie* case under a disparate impact theory.

Accordingly, the standards by which the Second Circuit reviewed the statistical evidence were entirely consistent with relevant precedent.

C. *The Second Circuit's Decision Is Not In Conflict With* Bazemore v. Friday

In Point III of their petition at page 22, petitioners maintain that the courts below "disregarded the imperative ruling of *Bazemore*." This charge is unfounded.

Contrary to petitioner's contention, the Second Circuit devoted a separate section of its opinion to a careful and thorough analysis of petitioners' *Bazemore* allegations. (A. 25) The Court correctly noted that *Bazemore* requires an employer "to eradicate employment discrimination that began prior to the effective date of Title VII (1972), if the discrimination continues into the post-1972 liability period", (A. 25), and that, under *Bazemore*, statistical evidence of pre-Act discrimination can be probative of ongoing, post-Act discrimination. *Id.*

However, the Court found that, where, as here, no pre-1972 salary discrimination was or could be found in the record before it, petitioners' attempt to create a *Bazemore*-type violation must be rejected. In particular, the Second Circuit found that, in marked contrast to *Bazemore*, and its own decision in *Sobel v. Yeshiva University*, 839 F.2d 18 (2d Cir. 1988), *cert. denied*, 490 U.S. ____, 109 S. Ct. 3154, 104 L. Ed. 2d 1018 (1989), where the petitioners had offered direct, independent proof of pre-Act discrimination, the petitioners here failed to produce such evidence. Indeed, the Court noted that "even though the Supreme Court handed down its decision in *Bazemore* the same

month that petitioners' trial commenced, the petitioners did not introduce any statistical evidence of substance to prove that there was discrimination at New Paltz prior to the effective date of Title VII." (A. 26)

By contrast, respondent produced the only salary studies relating to pre-Act decisions for the years 1971 and 1972. These studies, accepted and relied upon by the Court below, showed that there were no statistically significant differences in the salaries of men and women in those years. (E 507) More is not required to defeat a *Bazemore* claim.[14]

D. *The Issue Of Which Party Bears The Burden Of Validating "rank" As An Independent Variable In a Multiple Regression Analysis Is Irrelevant In This Case*

This Court has conclusively held that in a Title VII class action, it is the plaintiffs who bear the ultimate burden "to prove discrimination by a preponderance of the evidence" with respect to *each* of their claims, *U.S Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In this case, petitioners claim that New Paltz discriminated against women with regard to initial rank and current rank, as well as salary. Although they have the burden of persuasion with regard to proving their claims of discrimination in rank and salary, they urge this Court to adopt a rule requiring respondents to validate the use of rank

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[14] Insofar as petitioners challenge the exclusion of exhibit 990 as a failure to comply with *Bazemore*, this charge, too, lacks merit and is unworthy of review by this Court. The record shows that petitioners' exhibit 990 purports to be a tabulation of women and men with no Ph.D. and no prior college teaching experience had the initial rank of instructor and how many held a higher rank. The exhibit, however, does not distinguish between persons hired before or after 1973 and does not show promotions which occurred before the effective date of Title VII (SA 276). Moreover, it includes persons holding only part-time positions in the Division and it omits full-time persons hired before 1973. Furthermore, it controls only for the absence of two qualifications (*i.e. no* Ph.D., *no* prior college teaching) and is cumulative of other evidence. Accordingly, as the Court below specifically held, it is so unreliable and incomplete as to be irrelevant. See *Bazemore*, 478 U.S. at 400, n.10.

with regard to their salary claim. Such a rule would effectively relieve petitioners of their ultimate burden of proof in this case.

Assuming *arguendo* that petitioners had not alleged a separate claim that rank at New Paltz was discriminatory, they should still bear the burden of proving any alleged defects in respondents' statistical proof, just as respondents bear the burden of proving defects in petitioners' proof. The revelation of any such defect, however, affects only the weight of the statistical evidence. It does not alter petitioners' burden of persuasion that discrimination has occurred. *See Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985). As this Court has repeatedly recognized, statistical evidence may be presented in a Title VII case in an infinite number of ways and the sufficiency of such evidence is necessarily subject to challenge on a case-by-case basis. *See Teamsters*, 431 U.S. at 340.

In any event, this is not the case in which to address the issue petitioners seek to raise. As the Second Circuit aptly noted, "at trial, [petitioners] failed to adduce any significant statistical evidence of discrimination as to rank" (A. 23). In affirming the decision of the District Court, the Court below recognized that petitioners' evidence as to rank, rank at hire and waiting time for promotion were mere compilations of data, "which neither accounted for important factors relevant to assignment of rank and promotion, 'nor demonstrated that observed differences were statistically significant.' " (A-23) At the same time, as the District Court found and the Second Circuit agreed, respondents offered "persuasive objective evidence" validating their use of the rank variable. Respondents demonstrated that there was no sex discrimination at New Paltz in either rank at hire or promotion between 1973 and 1984. (SE 342, E494, SA 675-78, 673-74). Thus, even if respondents had the burden of validating rank, that burden was met here in all respects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 11, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents

O. PETER SHERWOOD
Solicitor General

JUDITH T. KRAMER
Assistant Attorney General
[Counsel of Record]

No. 89-612

IN THE

Supreme Court of the United States

October Term, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE de la COVA and DOROTHY JESSUP, individually and on behalf of all other persons similarly situated,
Petitioners,

-against-

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ELEANOR JACKSON PIEL
Attorney for Petitioners
36 West 44th Street
New York, New York 10036
(212) 575 0797

December 26, 1989

PRINTINGHOUSE PRESS—25 WEST 43RD STREET, NEW YORK, NY 10036 (212) 719-3120

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No. 89-612

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE de la COVA and DOROTHY JESSUP Individually and on behalf of all other persons similarly situated,

Petitioners,

-against-

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents have failed to show how the five questions presented by petitioners for review to this Court are not appropriate for decision by this Court at this time.

As set forth in the Petition, the

Court below failed to follow the teaching of this Court on issues involved in multiple regression analysis as applied to a Title VII class-action gender discrimination case by female faculty at a state university. This was ignored by the respondents in a brief which makes niggling arguments from alleged facts which were not found to be true, nor relied on by either the trial court nor the court below.

Plaintiffs below showed that gender played a motivating part in decisions with respect to employment of faculty starting with the initial determination of rank and tenure and persisting in decisions as to promotions and salary, presenting evidence that met the threshold rulings by this Court on the issue of Title VII gender discrimination in two modes:

1. Multiple regression analyses which demonstrated, at a level of statistical

significance recognized more than once by decisions of this Court, that gender was a factor in the unequal distribution of rank, salary and promotions;

2. Anecdotal evidence from women faculty, class members and individual plaintiffs which gave vivid instances of discrimination on account of gender against female faculty, members, especially those advocating women's rights, and established the consistent failure of the respondents' so-called affirmative action programs to be effective in adjusting the inequities in salaries that were conceded by the university administration to exist at the beginning of the class period.

I

Conflict with Price Waterhouse v. Hopkins, 490 U.S.___, 104 L.Ed. 2d 268 (1989)

Respondents offered no evidence as required by *Price Waterhouse* that the

defendant would have made the same decision concerning instances where women were unfavorably considered had they not taken gender into account.

Respondents argue that *Price Waterhouse* was "intended to supplement the Title VII analysis in limited cases where a disparate treatment plaintiff produces *direct* evidence that an illegitimate criterion was a substantial factor in the decision." To the contrary that case does not distinguish between direct and circumstantial evidence showing such gender discrimination. This Court has confirmed the validity of multiple regression analysis as effective evidence in a Title VII case. Further, respondents maintain erroneously that *Price Waterhouse* is not applicable to class actions, arguing that if the class had prevailed, they would have prevailed under the doctrine of *Texas*

Department of Community Affairs v.Burdine, 450 U.S. 248 (1981)

This raises the next issue as to the significance of multiple regression analysis statistics. From such evidence plaintiffs in this case made out a prima facie case under the standards set by this Court in a line of cases commencing with *Castenada v. Partida,* 430 U.S. 483 (1977). In their misunderstanding of that holding neither the trial court nor the Court below, nor respondents in their brief in opposition have properly addressed this issue.

II

Statistical Evidence Accepted as Persuasive by the Trial Court Was Disregarded by the Court below in its Misunderstanding of this Court's Rulings on Statistical Proof

Petitioners argued that they had established a prima facie case as to gender discrimination in compensation of female

faculty members from statistical data furnished by defendants and subjected by plaintiffs to regression analyses employing variables accepted by the trial court as "persuasive." These regression analyses showed negative residuals for females to be in the range of two, three and more than four and five standard deviations (A-126). Such outcomes establish that this is *not* a case where the statistical evidence (at least as to Exhibits 888,889, and 890 were concerned) was either "inaccurate or insignificant." (See *Teamsters v. United States*, 431 U.S. 324, 360 (1977).

Petitioners contended in the court below that the trial court had not understood the meaning of "statistical significance," when it spoke of "relatively small disparities, such as one to three standard deviations" and declared that with such proof "a court should be cautious about drawing

an inference of discrimination."*

The affirmance of the trial court ruling and reasoning by the court below is at odds with this Court's rulings on statistical evidence commencing with *Castenada* and continuing through *Bazemore v. Friday*, 478 U.S. 385 (1986), and with the other Circuit Courts of Appeal which have addressed the issue of the compelling persuasiveness of multiple regression analysis where the variables chosen are valid and the results demonstrate significant disparities between a protected group and the group to which it is compared. (See Pet. p.20).

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* The error of this statement is two-fold. It shows how the court misunderstood the nature of statistical significance (the differences increase exponentially between 1, 2 and 3 etc. standard deviations) and as applied to the facts of the present case, there was never a contention that one standard deviation was significant.

Respondents sought solace in the holding in *E.E.O.C. v. Sears,* 839 F. 2d 302, p. 323, n. 20 (7th Cir. 1988) where the Court of Appeals suggested that three standard deviations is a minimum cut-off point for statistical significance. It is submitted here that that case stands alone in this holding and further the real holding of the case is to be found in Judge Catlet's dissent at p. 366 in speaking of that case being "tainted in its origins" because "it was tried without recourse to flesh and blood victims." Contrary to the case below which had over 20 anecdotal witnesses, there were none in the *Sears* case. In addition, on the statistical issue, the reference to three standard deviations as a minimum standard is at variance with other courts, and is dicta only since the court found the plaintiffs' statistics otherwise flawed (See p. 349).

III

The Standard this Court Set in Bazemore Concerning the Requirement that an Employer Equalize Employment Conditions as Soon as the Civil Rights Act Applies to its Employees Was Misunderstood and Ignored Below

Petitioners had established through the lips of the defendant's administrators that a report of a Committee on the Status of Women was delivered to the University President in 1974 establishing that 32 women faculty had claimed salary inequities of $1000 or more. The President approved the report and thought it the appropriate basis for making salary adjustments which were *never* made. (Pl. Exh. 126, T. 3308, 3464). The trial court found that the procedure of respondents for identifying salary inequities "from 1973 to 1984 were flawed, improperly applied or non-existent" (A-61). Thus on the anecdotal side, the only conclusion that can reasonably be drawn from the record is that

the pre-Act *Bazemore* inequities accepted as existing by the New Paltz administration, were never addressed or remedied.

Petitioners' robust statistics establishing salary inequities (as well as rank and promotion inequities) included in all of their regression runs the calculating of variables which reflected the employment history of faculty members, including facts about them prior to 1972 when the Civil Rights Act became applicable to universities. In 1973 faculty hired prior to 1972 comprised 94 per cent of the faculty and even at the end of the class period in 1985, the pre-1972 hires comprised 69 per cent of the faculty (SE 342x). The respondent, on the other hand, offered no statistics or proof on this issue (pre-1972 status and salary levels) except for two exhibits which the trial court found to contain too little

information (A-47). The trial court did note, however, without realizing its significance, that none of the defendant's statistical studies accounted for "the residual of any pre-1973 discrimination." (A-53).

The trial court as affirmed by the court below, demonstrated egregious ignorance of the significance of the pre-1972 salary inequities in its rulings on evidence when it excluded an exhibit (Pl. 990) because it included criteria reflecting on persons hired before 1972 (T. 2900-2902). Respondent's footnote on page 21 of its brief is opaque and factually misleading. Exhibit 990 was a window into the hiring practices at New Paltz. It showed that women and men without a Ph.D. or prior teaching experience were hired disproportionately into different ranks, both before and after 1972. Men were hired, in the

main as assistant professors and women were hired as instructors. This set the foundation for showing from other evidence adduced from the defendant's administrators that persons who started at lower ranks and lower salaries continued to stay behind those hired at higher ranks and salaries (T. 672).

IV

The Issue of Discrimination against Female Faculty as to Rank in Initial Placement and Resulting Subsequent Inequities Was Demonstrated Below in Various Statistical Exhibits; This Issue, and How it Should be Proven is Ripe for Decision by this Court

Fulfilling their burden of persuasion, plaintiffs below demonstrated that using rank as a variable in seeking an accurate finding on gender discrimination in a university faculty, "double-counts" (i.e. reduces the weight of the gender variable) since the same entity makes both the salary determination and makes the determination

as to the rank of the faculty member.

A statistical table (Exh. 1021) showed that by subtracting the residual or the effect of being female attributable to rank as an independent variable, from the larger residual, one could determine the effect of rank on the result. The difference between this residual and zero in each year of the class liability period exceeded by two standard deviations, and more, showing that differences in the rank of men and women on the faculty had to be attributed to discrimination on account of gender. Yet the trial court and the court below dismissed these statistics as "mere compilations of data." (A-23,A-48) That, of course, is all one can expect a multiple regression analysis table to be. Nonetheless this Court has stated that such compilations of data -- to wit, multiple regression tables indicating statistically significant

differences between groups of persons -- can provide the proof a plaintiff must produce in a Title VII discrimination case. See *Castenada, Bazemore, etc.*

V

Petitioners' Entitlement to a Judgment as to Liability where Respondents Applied Subjective Standards to Decisions Involving Faculty, their Salary Levels, their Rank and Promotions

Respondents did not acknowledge petitioner's fifth "Reason for Granting the Writ" which was based on the holding in the recent case, *Watson v. Fort Worth Bank and Trust*, 487 U.S. ___, 108 S. Ct. 2777, 101 L.Ed. 2d 827 (1988).

The factors to be considered as criteria for promotion, tenure or salary increase were five subjective standards, as set forth in the Petition, p. 28. The record was replete with subjective determinations and opinions submitted by respondent at trial about the entire class of women suing

as well as the individual plaintiffs. At the conclusion of the case the trial court ruled that on these criteria (A-89), "New Paltz did not intend to discriminate against women" (A-62). This ruling was affirmed below (A-3). Most of the discussion concerning the evidence throughout the trial court's opinion concerned the evaluation of this subjective evidence, and that court's opinion that the evidence did not prove intentional discrimination against female faculty. If the court had evaluated the evidence initially under appropriate standards, it would have had to find that the robust statistical findings supported proof of a prima facie case of discrimination as to gender. Thus the proof adduced was sufficient for a finding of liability on a disparate impact theory.

This issue in a class action case is again one which is ripe for adjudication by

this Court.

CONCLUSION

This Court should grant the petition for a Writ of Certiorari and set the case down for briefing and oral argument.

Respectfully submitted,

ELEANOR JACKSON PIEL
36 West 44th Street
New York, N.Y. 10036
(212) 575-0797
Attorney for Petitioners

December 26, 1989